Y 4. P 96/10: S. HRG. 103-521

Whistleblower Issues in the Nuclear...

S. HRG. 103–521

WHISTLEBLOWER ISSUES IN THE NUCLEAR INDUSTRY

HEARING

BEFORE THE

SUBCOMMITTEE ON
CLEAN AIR AND NUCLEAR REGULATION

OF THE

COMMITTEE ON
ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

JULY 15, 1993

Printed for the use of the Committee on Environment and Public Works

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WHISTLEBLOWER ISSUES IN THE NUCLEAR INDUSTRY

THURSDAY, JULY 15, 1993

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
SUBCOMMITTEE ON CLEAN AIR AND NUCLEAR REGULATION,
Washington, DC.

The committee met, pursuant to notice, at 9:00 a.m. in room 406, Dirksen Senate Office Building, Hon. Joseph I. Lieberman [chairman of the subcommittee] presiding.

Present: Senators Lieberman, Metzenbaum, and Simpson.

OPENING STATEMENT OF HON. JOSEPH I. LIEBERMAN, U.S. SENATOR FROM THE STATE OF CONNECTICUT

Senator LIEBERMAN. Good morning.

This hearing of the Subcommittee on Clean Air and Nuclear Regulation will come to order.

Today the subcommittee is conducting a hearing on the NRC's treatment of whistleblowers in the nuclear industry. For purposes of definition, whistleblowers are people who inform the NRC of nuclear safety concerns, or people who allege that they were intimidated and harassed by their employer because they raised safety concerns.

The NRC's Inspector General has just issued a report which I requested on the NRC's handling of allegations of intimidation and harassment that are raised by employees in the nuclear industry.

The IG's report contains some disturbing statistics on the small number of investigations undertaken by the NRC in response to allegations of violations of the whistleblower protection statute, which I will want to ask the NRC about today.

For example, the NRC IG reports that between October of 1988 and April of 1993 the NRC received a total of 609 retaliation complaints and initiated full-scale investigations of 44 of them. Only 7 have resulted in enforcement action—seven enforcement actions out of 609 complaints over a 4½-year period of time.

That record raises serious questions about the NRC's conduct in investigating and acting on whistleblower complaints.

To indicate why I feel that is so, according to the NRC's IG, the Department of Labor has found in favor of whistleblowers, or allegers, as they are called in that report, in 58 cases over the last 5 years, and 41 other cases have been settled.

Of those cases, approximately 100, the NRC has completed only 8 investigations, and another 13 are outstanding.

So the question arises: Why, in so many cases where the Department of Labor has found that there was unlawful discrimination, retaliation against the whistleblower, has the NRC not taken any enforcement action?

These statistics are statistics that have consequences, because employees in the nuclear industry are literally our first line of defense against nuclear accident. They are the most knowledgeable about the nuclear equipment that they build and operate, and have the primary responsibility for protecting the public health and safety.

Because of this overriding responsibility, workers in the nuclear industry must feel free to raise safety concerns with their management or with the NRC.

The NRC, for its part, of course, has the responsibility for regulating, licensing, and inspecting nuclear powerplants so that there is an adequate protection for the public health and safety.

However, it is obvious that the NRC cannot inspect every item that affects nuclear safety. The NRC has perhaps two or three inspectors at each nuclear powerplant. There may be more than 1,000 or 2,000 workers at these plants. The NRC inspectors obviously cannot be everywhere at every moment in these highly-sophisticated operations.

To fulfill its mission, the NRC therefore must rely on operation provided by its licensees and by others in the nuclear industry. To be able to rely on that information, the NRC must be able to verify its accuracy through inspections and through information obtained through more informal means from people in the nuclear industry.

So whistleblowers are there for a critical part of the NRC's inspection and oversight activities, and they must be able to inform either their management or the NRC of safety problems without fear of retaliation.

Now, because some of the statements and evidence that will be put forward today are critical of people who work in the nuclear industry, let me say what is obvious but should be said anyway. Most people in the nuclear industry are clearly honest and dedicated to public safety; however, human nature is human nature, even at nuclear powerplants. Sometimes people make mistakes. Sometimes people don't admit that they have made mistakes or that they have had problems.

Unfortunately, these human weaknesses in the management of complex nuclear technologies can lead to very serious accidents—perhaps even disasters.

As we have seen over and over again in accidents involving modern technology—Three Mile Island is the most graphic example that comes to mind—the compounding of small mistakes can lead to large tragedies.

I think of the words of James Madison in a broader context, who questioned against relying solely upon the good intentions of public servants to achieve good government, concluding that: "Experience has taught mankind the necessity of auxiliary precautions." That remains true of Government, and is also true in this area of regulating and providing safety of nuclear power plants.

Let me stress that this is not a pro- or anti-nuclear issue. This is a public health and safety issue. Some very major safety problems have been identified by whistleblower.

I know some may think that whistleblowers are pranks, but important safety problems have been revealed by whistleblowers, and these include: safety problems of the nuclear power plants operated by the Tennessee Valley Authority, the unreliability of Rosemount transmitters in nuclear power plants, the inadequacy of the emergency lighting system at the Palo Verde Nuclear Plant, and the unreliability of the thermalag fire retardant that is installed in many nuclear power plants.

On each of these issues, after an initial whistleblower complaint the NRC has ordered corrective actions. Sometimes, as in the Rosemount transmitter matter, and in the thermalag problems, the corrective actions have affected a large number of nuclear power plants throughout this country.

Congress recognized the important of whistleblowers in 1978 when it passed section 211 of the Energy Reorganization Act, which prohibits discrimination against any employee because the employee has raised safety concerns.

The law is clear that this type is discrimination is illegal; nonetheless, we are now hearing a number of criticisms that in practice the law is not working.

The most common complaint for whistleblowers is simply that it takes too long to fully investigate their allegations and to resolve employee complaints about illegal discrimination—that is to say, retaliation.

A number of these cases have, in fact, taken years to resolve. A number of whistleblowers have been able to prevail only through remarkable persistence and single-minded determination. Many have suffered serious legal, financial, and emotional consequences for speaking out.

The truth is that we may never know how many simply gave up in these circumstances, or never came forward in the first place for feat of the consequences.

Serious problems of safety may exist today that we will not be warned about because workers may feel unprotected if they blow the whistle. If that is the reality, obviously it is unacceptable and we must do better. Justice delayed here, as elsewhere, is justice denied. And in this case public safety may be jeopardized. Clearly the status quo is not enough.

Today we are going to hear testimony from two whistleblowers who will relate their personal experiences in raising safety issues. These cases provide examples of some of the types of problems that whistleblowers have had.

Although we are hearing testimony from whistleblowers to give us examples of the problems with the current process, I want to stress that we are not here to resolve any particular case. This hearing does not represent an attempt to reach conclusion on any of these cases either by the subcommittee or by myself.

A number of the whistleblowers say that they would advise other workers in the nuclear industry not to come forward with safety concerns that their management does not want to hear. These

whistleblowers actually believe that the law, as implemented, does not provide adequate protection to whistleblowers.

The NRC's Inspector General, as indicated in the report issued today, talked to a number of whistleblowers and NRC staff who believe that the current process simply does not adequately protect whistleblowers, and that is a very disturbing conclusion.

The law is not working if people who have raised valid safety concerns would recommend to others that they not speak out if they see that something is wrong.

The law is not working if people cannot speak out when they see situations that they fear are dangerous because of greater fears of the legal, economic, or bureaucratic consequences.

So I look forward to hearing the reaction of the NRC to the Inspector General's recommendations, and hope, as in other matters that we have dealt with in this subcommittee and the NRC in the last four or five months, that we can create a climate of change—a climate, in this case, in which all workers will feel free to blow the whistle on safety concerns and know that they will do so without danger of suffering wrong by doing what they thought was right.

I will say here that if the NRC either does not act or feels that it does not have the authority to act to correct some of these situations, clearly Congress can and should.

Cases brought to this committee's attention at their worst, I would say finally, occasionally reminded me of the English Court of Chancery described by Charles Dickens in Bleak House. I quote from Dickens, just as a warning of the extreme of what may happen here, when he wrote of that court which has

> Its room suitor, with its slip-shod heels and threadbare base, borrowing and begging through the round of every man's acquaintance, which gives to monied might the means of abundantly wearing out the right, but so exhausts finances, patience, courage, hope, so overthrows the brain and break the heart, that there is not an honorable man among its practitioners who do not often given the warning, "Suffer any wrong that can be done to you rather than come here."

Obviously, that is a nightmare statement, and it is one that all of us want to act to make sure is not the reaction of those who blow the whistle about safety problems in the nuclear industry.

With that, I yield to my colleague and friend from Ohio, Senator Metzenbaum.

OPENING STATEMENT OF HON. HOWARD M. METZENBAUM, U.S. SENATOR FROM THE STATE OF OHIO

Senator METZENBAUM. Thank you very much, Mr. Chairman. I am very interested in this subject because I view that whistleblowers in Government have, at the very best, been tolerated, but not welcomed with open arms by their superiors.

I am frank to say, Mr. Chairman, that I don't know much about the issues that will come before this subcommittee today. I do know I am interested in the subject.

I would hoe that after you have heard the testimony and concluded that some action was necessary, I would hope you would not hesitate to move forward, because if the whistleblower can't get recourse by dealing directly with his or her employer, and then comes to Congress as a last alternative, and we don't back him or her up

if that be the right thing to do, then I would say it would be disappointing.

I'm not going to be able to stay because I have two other committee meetings which I must attend.

But I will say this. My feeling with respect to the Nuclear Regulatory Commission and my concern about its attitude on these matters goes back not one week, not one month, but before I ever came to the United States Senate.

It goes back to the time when a Doctor John Gulfman at the Livermore Laboratory in California was called upon to make an evaluation of the safety and security of the nuclear plants of this country, and he made that determination, and he came to the conclusion that they weren't safe.

You would have thought that the NRC would have said, "Thank you. Let's get into it further. Let's see what we can do about it," because we are not dealing with some unimportant detail but we're talking about nuclear emissions into the air—in some instances, not all. We are talking about the possibility of nuclear accidents.

Doctor Gulfman was rewarded for his efforts in that direction for exposing the fact that so many nuclear plants were unsafe. He was terminated. Terminated. He has never been able to get back into the Government's good graces ever since.

I happen to know the man. He was the valedictorian of my high school class and a friend of mine. But I'm not looking for a job for him. Obviously, it is beyond that point.

But what bothers me is that Government is unwilling to accept responsibility in too many instances when a whistleblower stands up, has the courage to speak out and say, "This is wrong." Instead of doing something abut it, Government either fires the individual, discriminates against the individual, but in very few instances pats him or her on the back and says, "Thank you for a job well done. You have contributed."

I don't know what the witnesses will say here today, but I have to assume that that's part of their complaint—that for their efforts in whistleblowing and bringing some facts to the attention of their employers they wound up on the streets or else being discriminated against.

I think we in Congress have a very strong responsibility in this area particularly. And I will say to you, Mr. Chairman, that although I won't be present you may be certain my staff will. I will look at the record. I will read the record. And I would hope to work with you. With your background as a former attorney general, I think there couldn't be a more appropriate person to be chairing this committee.

I say to you that we must share some responsibility if whistleblowers are discriminated against. I don't know the facts in this case. They may or may not have been. But if that be the case, then we do have some responsibility to take some action.

I thank you for holding the hearing.

Senator LIEBERMAN. Thank you, Senator Metzenbaum.

Thanks for your statement, and thank you for your support. I look forward to working with you on this matter.

The first witness today will be Mr. Paul Blanch of West Hartford, Connecticut.

Mr. Blanch, I'd ask you to stand if you would and raise your right hand. We are going to administer the oath to the witnesses today.

Do you solemnly swear that the testimony that you will give before this subcommittee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. BLANCH. I do.

Senator LIEBERMAN. Thank you.

Mr. Blanch, I'm going to try, if I can, and enable you to use your time more effectively, to just briefly state the facts in your case before I ask you to begin testimony yourself.

Mr. Blanch was the senior manager for Northeast Utilities at the Millstone Nuclear Powerplant in Connecticut.

In 1989, he discovered that certain instruments in nuclear powerplants were unreliable. Those instruments, which were called Rosemount transmitters, are used to measure pressure level and flow of water in a nuclear power reactor. A failure of one of those transmitters could result in the failure of important plant safety systems.

Mr. Blanch brought to his management and to the NRC his concerns about the reliability of the Rosemount transmitters. Northeast Utilities corrected the problems, that Mr. Blanch had identified with those transmitters promptly; however, in October of 1989 Mr. Blanch did file a complaint with the Department of Labor, alleging that he was harassed and intimidated at his work place because he had raised this safety issue.

The initial Department of Labor Investigation found in Mr. Blanch's favor. In January of 1990, he signed a settlement agreement with the utility and withdrew his complaint. In February of 1993 he signed another settlement agreement and resigned from the utility.

In May of 1993 the NRC concluded that Mr. Blanch had been subjected to intimidation and harassment for raising a potentially significant—and I might say generic—safety issue. The NRC fined the utility $100,000. The utility paid the fine, but also, for the record, filed a 100-page response denying the NRC's interpretation of many of the facts underlying the fine.

Overall, it took the NRC from 1989 to 1993 to substantiate Mr. Blanch's allegations of intimidation and harassment. The length of time it took to resolve his complaints has raised questions about the process here.

With that, Mr. Blanch, I am going to save you from needing to go over those facts as part of your statement. I now welcome your testimony.

TESTIMONY OF PAUL BLANCH, WEST HARTFORD, CT

Mr. BLANCH. Thank you, Mr. Chairman.

As you mentioned before, I am Paul Blanch, former engineering supervisor for Northeast Utilities. Accompanying me this morning is Mr. Ernest Hadley, the attorney for We The People, an organization that advocates nuclear safety and provides legal assistance to nuclear whistleblowers such as myself. He is also my personal attorney.

I appreciate this opportunity to provide this subcommittee my opinions concerning the NRC's handling of nuclear whistleblowers. At this time I would also like to personally thank you, Senator Lieberman, for your unwavering support, and also thank We The People for their legal and moral support, without which I would have wound up like every other whistleblower—unemployed and destitute. Thankfully, I am presently only unemployed.

I am not here to tell my personal story, but to comment on the pathetic abuse suffered by all whistleblowers at the hands of the licensees and the Nuclear Regulatory Commission.

The NRC's Inspector General's report released today cites more violations of the rights to these individuals than those cited in the recent Navy Inspector General report on the Tailhook Scandal. I pray this subcommittee will cause similar action to be taken by these violators of innocent citizens, who I submit, in their own way, have been every bit as ravaged as the victims of Tailhook.

While the NRC and the industry have tried to make this term "whistleblower" a label of shame, I regard it as a mark of responsibility to my profession and to my fellow citizens. The nuclear industry is what I classify as a "closed industry." Because this is a highly-technical industry, little is known of its technical and regulatory problems by individuals outside of this closed industry. And, quite frankly, that's exactly how the industry would like to keep it.

They prefer silence and cover-up to public disclosure and action. Consequently, the only credible criticism comes from within this closed industry from individuals they label as whistleblowers.

These responsible critics of the industry, whether you call them whistleblowers or ethical resisters, risk everything in speaking out.

Through the NRC's inaction, by way of blatant character assassinations, as recently demonstrated in the Gunderson OI report; terminations by licensees, such as the Delcor and O'Sullivan situations in Connecticut; buy-outs of many people, without any enforcement action the industry systematically eliminates its critics in a methodology not unlike ethnic cleansing—or a more apt description in this situation, "ethic" cleansing.

The industry's ethic cleansing seeks to silence the voices of those whose only concern is nuclear safety and ethics. And individual who questions either the inaction of the NRC or the licensee is conveniently and viciously discredited, demeaned, subject to psychiatric examinations, portrayed as a radical or a disgruntled employee, and eventually is cleansed by termination or buy-out.

This issue of whistleblowers is grave, but only a symptom of a much larger problem within the industry. That problem is that the Nuclear Regulatory Commission selectively ignores many significant regulations, thus putting the public at an unknown risk.

We have no idea which or how many regulations are being ignored, or if we have the potential for a Chernobyl type of accident. Imagine, if you will, the chaos and panic that would grip our citizens should it become necessary to evacuate the millions of residents living within a 30-mile radius of the Pilgrim Plant just outside of Boston or the Indian Point Plant just outside of New York City.

But why is this intimidation of employees permitted to continue unchallenged by those in power to oversee our nuclear industry?

Why must honest, responsible employees who speak out about potential dangers in our system be stigmatized as disgruntled employees and forced out of their jobs and careers in disgrace?

I believe the answer is quite simple: the industry and the Nuclear Regulatory Commission are putting economic interests of corporate giants ahead of the safety interests of its citizens.

In my 20 years of dealing with both the Atomic Energy Commission and the Nuclear Regulatory Commission, I am firmly convinced that the NRC will never take any significant action which could possibly affect the economic viability of the nuclear industry.

At the same time, less serious violations that pose no threat to the economic viability of plants are acted upon swiftly and severely by the NRC to dupe the general public by presenting an illusion of action.

It is clear, then that the so-called "whistleblowers," while they be an embarrassment to their employers, are performing a vital service to our country. And yet their record of treatment by employers, as I believe has been confirmed and documented by the Inspector General's report, paints them as villains and turn-coats.

I have taken the numbers from the Inspector General's report and tailored them more to the utilities, and a little clarification on your numbers that you presented, Mr. Chairman. But I understand there have been 609 cases of alleged harassment reported to the NRC, and most likely 609 careers destroyed.

Of these cases, it is my understanding that only 44 have been investigated by the Office of Investigation. Of these 44, only 14 have been decided in favor of the employee, and only two cases—which is less than ½ of 1 percent—have resulted in fines for the utilities.

The fine against Northeast Utilities was not included in these numbers because that occurred after the report was completed.

I have been contacted by many potential whistleblowers from Northeast Utilities and other licensees for advice. I will never again in good conscience encourage these individuals to take on a losing battle and subject themselves and their families to the emotional and financial stress that is certain to follow from speaking up. Sadly, my advice to them is, "Shut your mouth, collect your paycheck, and pray that somehow the failures will be corrected before it is too late."

The cards are stacked against you. Unless you feel like gambling with your life and your family's security, your chances of beating the system are akin to playing Russian Roulette with only two empty chambers in a weapon loaded with 607 live rounds. The most you can hope for is survival.

At least in Russian Roulette there is a possibility the families will collect life insurance.

Mr. Selin, the chairman of the Nuclear Regulatory Commission, recently stated that, "Blanch should be Vice President for Engineering at Northeast Utilities"—I agree with Mr. Selin there—for my actions in identifying the Rosemount issue. Instead, I was conveniently cleansed from the industry with a silent acquiescence of the NRC.

In May of this year I asked Mr. Selin if there were any positions within the NRC that I could provide my thoughts on regulations

and actually influence the regulatory philosophy. I was told by Mr. Selin essentially to review the job posting within the Nuclear Regulatory Commission ads. And this only confirms my suspicion that the NRC opposes individuals critical of the industry as much as the licensees do.

Mr. Chairman, I have provided this subcommittee some additional suggestions to supplement those provided earlier to the subcommittee staff on what needs to be done to ensure an open and free exchange of information that can be vital to the safety of the nuclear industry and all of us.

After personally observing the complete failure of the Nuclear Regulatory Commission to enforce any significant regulations, I am reluctant to advocate any additional regulations or legislation. I greatly fear that new regulations or legislation will give the illusion of action to correct the problem, and, with that illusion complete, the NRC will be back in business as usual.

But I do support the legislative changes recommended by Mr. Hadley. By strengthening the remedies available to individuals, you can send a clear message to the employees, the nuclear industry, and the NRC that you truly value nuclear safety over profits.

But new regulation or legislation alone will not correct the problem. What we need is a bold commitment within the Executive Branch that will transform the NRC from a nuclear lapdog to a nuclear watchdog.

Mr. Chairman, I am a success story. I survived though unemployed. I was not terminated. I was not financially ruined. I could not be discredited, even though my ex-employer tried desperately.

But let me tell you in all honesty: no one should ever have to go through what me and my family have been through over the past several years.

I am now isolated by the industry that I have given my entire professional career to. There is virtually no chance that I will ever work in my chosen field again. My past associates vacate the room when I enter.

If the system truly works as well as Mr. Selin will tell you later, can he explain what happened to me? And what of the others here today who are not success stories?

Let me make this final point. If the nuclear industry were half as effective in the disposal of radioactive waste as it is in the disposal of whistleblowers our waste disposal problems would have been solved 20 years ago.

I thank you, Senator Lieberman, for this opportunity to appear before this subcommittee. At this time, I would like to respond to any questions you may have.

Senator LIEBERMAN. Thank you for your statement, Mr. Blanch.

Let me go back to what you did here, without getting into the details technically.

Is it fair to say that it would have been unlikely that anyone other than a person in your position would have discovered the problems that you found with the Rosemount transmitters and the water level indicators? In other words, would the NRC inspections have been likely to uncover that? Or is that really something that more likely would have had to have been found by an employee of a licensee?

Mr. BLANCH. In response to that question, there are two ways that particular problem could have been identified. Certainly the manufacturer, who had been aware of the problem for many, many years, could have come forward to the Nuclear Regulatory Commission and said, "We have a problem." They elected not to do that.

Only employees with an understanding and the availability of computer technology like we had at Northeast Utilities allowed us to identify that particular problem. The NRC could not have identified that problem. They don't have access to the data that I had access to, and it basically involved researching historical computer records.

The other problem which I identified, which essentially resulted in my departure from Northeast Utilities, was much more significant than the Rosemount issue. This was an issue with the level transmitters, which is discussed in my full testimony—level transmitters on all boiling water reactors and many of the pressurized water reactors.

This is a problem that has been around for 30 years. This is a system that was designed with the top engineers of General Electric. And I happened to discover that problem—again, using computer technology.

We are not sure, but this problem was also identified in Sweden in 1982. It is my understanding the Nuclear Regulatory Commission is presently looking into why the industry in the United States never became aware of this problem when, in fact, it was known over in Europe.

This, again, is a very, very significant problem which could jeopardize many of the safety systems on many of the reactors, but yet they are still operating.

Senator LIEBERMAN. These are difficult questions to answer without becoming highly technical, but could you just try, in layman's language, to describe what the consequences of the problems you identified were? What might have happened if you had not blown the whistle?

Mr. BLANCH. With respect to the Rosemount transmitters, these devices are used to measure flows, levels, pressures in the reactor. They are the largest manufacturer of instrumentation. They sense the pressure.

They had a very high failure rate, and this failure couldn't be detected by normal operator observation. It could only be detected by computer technology.

The consequences of the failure of the Rosemount transmitter, and what we are—I won't get technical, but we are dealing with probabilities of failures here. It increased the probability that there would be an accident. It increased the probability, by our calculations, by 6,800 percent.

Senator LIEBERMAN. What kind of accident would that have been?

Mr. BLANCH. It could have been almost any accident, from a loss of coolant accident to a loss of flow to an overheating type of accident. These devices are used everywhere within the reactor systems, both on pressurized water reactors and boiling water reactors.

The potential consequences of the failure of the level device are more dramatic. This isn't the most serious problem in the industry, but the failure of the level device is a phenomena that I uncovered at Northeast Utilities and constantly kept the Nuclear Regulatory Commission informed. When there is an accident on a boiling water reactor—of which there are 37 in this country—we're not talking a probability of 1 in 100 chance of failure. We have a guaranteed failure of all level instruments.

The NRC and the industry will argue defense and depth, redundancy. For this system, Mr. Chairman, there is no redundance. The ultimate——

Senator LIEBERMAN. In other words, what you are saying is that what you alleged was wrong was guaranteed to create a failure? Or are we talking——

Mr. BLANCH. Essentially guaranteed to provide the operator information which would indicate to him that the core is being covered when, in fact, it may be melting.

Now, people have become aware of it because of my exposing this issue to the NRC through We The People, and operators are now at least familiar with how to handle this event. I agree with that assessment.

The NRC is eventually going to require most reactors to fix it. The industry wanted to study it. I was attempted to be discredited by various industry representatives that I didn't know what I was talking about, this couldn't happen.

Testing has concluded and proven what I said a year ago is, in fact, right on the money.

Senator LIEBERMAN. Who has done the testing?

Mr. BLANCH. The testing was sponsored by the Boiling Water Reactor Owners Group, working in conjunction with the Electric Power Research Institute, monitored by the Nuclear Regulatory Commission.

Senator LIEBERMAN. So, again, what you are saying here—just speak of it in layman's language—is that you uncovered a situation which at some point was guaranteed to fail? Now, it could be that the operator would know how to deal with that to mitigate the effect of it, but this was a device that at some point was going to let us down?

Mr. BLANCH. Well, if there was an accident, which the plants are designed for, and it was caused by a rapid depressurization, the operator would see all indications of his reactor level. They would indicate that the reactor is covered when, in fact, testing has shown that the actual level could be 27 feet below what the indicated level is.

If it is 27 feet lower than the top of the core, the core is uncovered and the core is melting. That's how significant it is.

Senator LIEBERMAN. So we are talking about melt-down as we saw in the Three Mile Islands?

Mr. BLANCH. It could be a melt-down. It could be worse than Three Mile Island because what would cause this event would be a rapid depressurization or breach of the reactors, and once that occurs then the fuel is exposed.

Now you have had both a breach of the reactor and a breach of the fuel. You didn't have a breach of the reactor at Three Mile Island—at least not a major breach.

Senator LIEBERMAN. Right.

Mr. BLANCH. The potential consequences are greater.

Senator LIBERMAN. So my conclusion, as a layman and as a citizen and as a Senator, is that you blew the whistle on some serious problems here that would have been otherwise difficult for others not in your position to have discovered.

Mr. BLANCH. These two instances, problems that I just cited, I believe would not have been exposed at this time unless I had done it.

Senator LIBERMAN. Are you satisfied at this point that the technical deficiencies that you found and complained of have been addressed satisfactorily?

Mr. BLANCH. Now I am 95 percent satisfied. I met with a task force two weeks ago at White Flint. With respect to the Rosemount I think they are 95 percent there. I think that there is very little risk associated with the use of Rosemount transmitters. The manufacturer has improved the product.

However, there was a long period of time where the NRC would take no action and the utilities would do nothing.

Senator LIEBERMAN. Right.

Am I right that Northeast Utilities was funded fairly rapidly in this case?

Mr. BLANCH. Northeast's response to both of these issues was nothing short of outstanding. I pushed it. They responded. We did fix it at all four of our nuclear powerplants.

Senator LIEBERMAN. But your concern about time has to do with the rest of the industry, because these are two systems that are widely used throughout the nuclear power industry in the country?

Mr. BLANCH. Yes. They are used in every reactor, and I don't even know what the status of overseas reactors is at this time, and it is not really my concern.

Senator LIEBERMAN. Let me go to some of the reactions to the problems that you have had that you described—not the technical problems now, but really the way the system responded to your blowing of the whistle.

In Mr. Hadley's June 10th letter to me (see p. 99) which contained your comments, you suggested having the NRC undertake quick investigations and to attempt to come to a decision within about 90 days, undertaking quick enforcement action whenever a retaliation is found.

Do you want to talk a little bit about that and about how feasible you think that is?

Mr. BLANCH. I am not sure that it is even feasible to accomplish with the present structure within the NRC.

Certainly, it won't be—nothing will occur unless we have a significant change in the attitude of the leadership of the NRC. I believe that—and it may be somewhat cynical—that the Nuclear Regulatory Commission does not want whistleblowers to come forward because they don't want to address large problems.

The problem with the reactor water level clearly violated every basic requirement of the NRC's 10 CFR requirements, and yet the

Nuclear Regulatory Commission, from the chairman down, refused to even respond to the particular question: will these devices work? They knew they wouldn't work. They wouldn't ask the question.

These 36 powerplants are still operating clearly outside of regulations, and I'm not even sure that the NRC has the authority to allow plants to operate outside of regulations. They have admitted they are operating outside of regulations.

Senator LIEBERMAN. Let me just have you clarify that. The 36 powerplants are operating outside the regulations in what regard?

Mr. BLANCH. With respect to reactor water level on all General Electric reactors.

Senator LIEBERMAN. The second problem that you discussed?

Mr. BLANCH. Yes, And they have acknowledged that fact in their most recent bulletin of May 28.

Senator LIEBERMAN. So, in part, what you are saying is that, while the more rapid the response that a whistleblower gets, the better it will be, nonetheless there has to be what might be called a change in impression, a change in credibility for whistleblowers, not to be skeptical about how their complaints are going to be handled? At least that's based on your own personal experience.

Mr. BLANCH. That is exactly true, Mr. Chairman. Many of us out there see what happens to people like me, people like Don Delcor, and some of the other—Linda Mitchell and Ann Harris.

There is an unbelievable chilling effect. Why would anyone in their right mind dare go through this?

I had a call two weeks ago from an individual who had a problem at Millstone, and I said, "You can't win." I said, "Give up." I am 100 percent serious. I told them "Don't push it. You are going to wind up dead. You are going to wind up unemployed. You are going to wind up, if you are lucky, to get an OI report which will wind up probably doing a character assassination on you."

Senator LIEBERMAN. That's obviously a sad story. Did you have any ability to judge the credibility of the concern that the potential whistleblower had?

Mr. BLANCH. The concern was a programmatic concern. It had to deal with quality assurance—not my area.

I don't know how significant the concern is, but the problem we have here is that the law states it doesn't have to be a significant concern. In fact, it only has to be a perceived concern.

Senator LIEBERMAN. Right.

Mr. BLANCH. The law doesn't protect them.

I talked to some high-level NRC officials. They prioritize their investigations by the potential safety significance of the issue.

We could have an individual who has a relatively small issue that got fired, and the Office of Investigation will never look at it.

Senator LIEBERMAN. Right.

Let me ask you a final question here about the process. The process is somewhat ornate—almost too ornate to describe in detail at the hearing. But, speaking just generally, what we have here is a situation where you can bring complaints to the Department of Labor about retaliation for whistleblowing. The NRC proceeds to investigate in regard to safety issues. And the Department of Labor has the ability to try to make the whistleblower whole, ordering compensation or damages or the rest. NRC can take action against

the licensee for either safety problems or for retaliating against the whistleblower.

There has been a lot of concern that this is a much too-complicated process and somehow it ought to be condensed. Some have said that it would be good for the whistleblower to have the results of the NRC investigation before they have to present their case to the Department of Labor.

Let's assume for a moment that we would raise up the confidence level that potential whistleblowers have in the process, to make it function better would you want to put together Department of Labor/NRC?

Mr. BLANCH. I'm going to have to respond to that in two different ways.

There are whistleblowers that bring forth issues like I did and receive retaliation that results in essentially no adverse employment action—threats, poor performance reviews, suspension of subordinates, like what happed in my case. I really didn't have adverse employment action taken against me.

I alleged to the Nuclear Regulatory Commission that I was retaliated against. This is a violation of NRC regulations. I didn't want the Department of Labor in there. The regulations say I may go to the Department of Labor, the NRC tells me I have to go to the Department of Labor. The NRC will do nothing unless you do go to the Department of Labor. That's one problem.

In my case, I alleged a violation of NRC requirements. It is the NRC's responsibility to enforce their own requirements. They should have investigated it, and made an initial finding. If they had to call in the Office of Investigation, that might be fine. But the NRC, when there is no adverse employment action, should be able to investigate those allegations and take appropriate enforcement action.

I have sent to you a copy of my comments with respect to the total complete ineffectiveness of the enforcement action that they took with respect to Northeast Utilities.

We need enforcement action that really has some teeth, that really is a deterrent—enforcement action that will put people before the Justice Department. That will really penalize them monetarily by taking away their license for a period of time. That will be a deterrent.

You will have whistleblowers coming forward. You will have safety issues identified if there is true deterrent. Right now it is a good business decision for a utility to fire an individual.

Senator LIEBERMAN. Mr. Blanch, thanks so very much for your testimony and, in a more personal way, thanks for all that you have done to make nuclear powerplants in Connecticut safer—and, if fact, nuclear powerplants around the country safer.

I do want to state for the record that we offered Northeast Utilities the opportunity to come in and testify today, and they indicated that they would stand by their previous statements and did not want to testify.

I thank you very much for being here. Thank you, Mr. Blanch.

Mr. BLANCH. Thank you, Mr. Chairman.

Senator LIEBERMAN. I will now call the second witness who is Allen Mosbaugh.

I'd also like to, at this point, enter into the record a statement from the Chairman of the Committee, Senator Baucus, on the subject at hand.

[Senator Baucus' statement follows:]

STATEMENT OF HON. MAX BAUCUS, U.S. SENATOR FROM THE STATE OF MONTANA

I would like to commend Senator Lieberman for conducting this hearing today on the Nuclear Regulatory Commission's (NRC) handling of allegations of intimidation and harassment that are raised by workers in the nuclear industry. This is a very important issue for the public health and safety.

People in the nuclear industry are our most important source of information about nuclear safety. These people must be able to freely bring to their employer or to the NRC any information they have that may affect the safety of nuclear power plants or nuclear materials. These employees must be able to raise safety concerns without fear of retaliation or discrimination by their employers.

Because of the significance of this issue, the Congress has provided statutory protections for nuclear employees who raise safety concerns. Both the Department of Labor (DOL) and the NRC have important roles in protecting the rights of these employees to report nuclear safety concerns without retaliation.

Although in may cases the DOL and NRC employee protection policies have worked very well, in other cases they have not. The process can be very slow. Both agencies have taken years to resolve various cases and allegations. The lengthy period of time it sometimes takes DOL or NRC to resolve cases or allegations is one of the major criticisms of the current process.

The NRC has the responsibility to ensure that NRC licensees, such as the operators of nuclear power plants, do not discriminate against employees who raise safety issues. The report that is being released today by the NRC's Inspector General states that the NRC is not adequately fulfilling this responsibility. The report concludes that the NRC is not adequately protecting people in the nuclear industry who raise safety concerns.

One of the major reasons for this finding is that the NRC's practice of awaiting DOL decisions before beginning its own investigations does not lead to a timely resolution of many allegations. In practice, this NRC policy may mean that the NRC will not begin an investigation of an allegation of discrimination until several years after the alleged unlawful acts have occurred. By then, an investigation and a subsequent enforcement action may be too late to have any deterrent or corrective value. This policy leaves many whistleblowers feeling abandoned by the NRC.

If the NRC is not adequately protecting people who raise safety concerns, then fewer safety concerns will be raised. Any such "chilling effect" will result in a lesser degree of protection for the public health and safety.

This is unacceptable. Workers in the nuclear industry must be totally free to raise safety concerns.

I will be looking forward to see how the NRC proposes to improve its processes to provide a better level of protection to whistleblowers. I also will be looking forward to further activities by the NRC's Inspector General to ensure that the NRC follows-up on this issue.

Thank you again, Senator Lieberman, for holding this timely and important hearing.

Senator LIEBERMAN. While Mr. Mosbaugh is coming to the table, I am going to attempt also to summarize his case so he can deal as much as possible with the process. He's somebody even more complicated, but I'll try to do it in a few pages.

Mr. Mosbaugh was one of the top managers at the Vogtle Nuclear Powerplant in Georgia. On March 20 of 1990, Vogtle Unit I was not in operation because it was being refueled. Unit II was at 100 percent power.

At 8:20 a.m. a truck accidentally backed into and broke an electric utility pole at the site, which caused the loss of all off-site power coming into the plant.

Unit II shut down and a site area emergency was declared. Each nuclear powerplant has two emergency diesel generators to provide electricity for vital safety systems such as coolant pumps in case all other sources of electricity are lost.

Even during refueling, a nuclear reactor core produces a lot of heat, and the coolant pumps must be kept running to keep the temperature down.

The Unit II diesel worked properly. At the time of the emergency, one of the two emergency diesel generators for Unit I was in maintenance. The other diesel was the only source of emergency electricity to keep Unit I cooled.

During the emergency, the I–A diesel generator would not work properly. It could not be started until 36 minutes after the start of the emergency.

During this time, the temperature of the water in the reactor core increased by about 50 degrees. That was during only a 36-minute period.

Several weeks later, on April 9, 1990, Georgia Power Company, which operates the Vogtle unit, wrote to the NRC requesting permission to restart the plant.

Regarding the reliability of the diesel generators, in its official submission the company wrote to the NRC that,

> Since March 20 the I–A diesel generator has been started 18 times and the I–B diesel generator has been started 19 times. No failures or problems have occurred during any of these starts.

This information was part of the basis for the NRC's decision to allow the plant to restart. In fact, this information was in error.

Four and a half months later, on August 30, 1990, Georgia Power Company submitted to the NRC a document it called "a clarification" of the April 9 letter. Georgia Power Company informed NRC in that communication that between March 20th and April 9th there actually were a total of 29 start attempts, and 21 of those attempts were considered successful. There were eight attempts that were not considered successful, which obviously means that the previous statement "no failures or problems have occurred during any of these starts" was not correct.

Among the attempts that were not considered successful were two unplanned trips of the I–B diesel generator—one on March 22nd and one on March 23rd. An unplanned trip in this case means the machine unexpectedly quit working.

In this case, Georgia Power accepted our invitation to testify after Mr. Mosbaugh. Since Mr. Mosbaugh will be testifying about his experiences with the company, we felt in his case, as well as in Mr. Blanch's, we would offer the company an opportunity to testify also.

I do want to indicate that the purpose of hearing Mr. Mosbaugh's testimony is to hear first-hand reports on how our nuclear safety and whistleblower laws are being implemented.

The fact that some of the issues that may be raised here today are also issues in proceedings before other agencies, I have concluded does not affect the capacity of the Congress or of this subcommittee particularly to carry out its responsibilities.

If congressional oversight can be accomplished in a manner which will not interfere with any pending proceedings, that clearly is the appropriate course to take.

I want to say that this subcommittee has been very careful to structure the hearing so that it will not interfere with any other proceedings; therefore, I do not intend to draw, as I indicated earlier, any conclusions about the merits of Mr. Mosbaugh's allegations, nor do we want to influence any pending investigatory or adjudicatory issues. We are here to really talk about his experiences and about what they say about the process.

I also want to enter into the record of the hearing a letter dated July 6, 1993, to the subcommittee from the Nuclear Regulatory Commission in which the NRC states,

> The Director of the Office of Investigations has concluded that public discussion by the subcommittee of information relating to Mr. Mosbaugh's allegations with either Mr. Mosbaugh or the Georgia Power Company will not adversely affect any current matter under investigation by his office.

The point here is that this is a matter still under investigation, and in that sense a cloud still hangs over everyone involved. And the public is rightly concerned about nuclear safety and allegations relating to those who operate nuclear powerplants. That is why we proceed with this matter at this time.

[The letter referred to follows:]

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

CHAIRMAN

July 6, 1993

The Honorable Joseph I. Lieberman, Chairman
Subcommittee on Clean Air and Nuclear Regulation
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Pursuant to conversations with your staff, it is our understanding that you are planning to hold a hearing on the Nuclear Regulatory Commission's handling of whistleblowers in the nuclear industry and that you may call Mr. Allen Mosbaugh and the Georgia Power Company to testify regarding Mr. Mosbaugh's experiences as a whistleblower prior to and after the site area emergency of March 20, 1990, at the Vogtle nuclear power plant.

On June 24, 1993, the NRC Atomic Safety and Licensing Board in the ongoing Georgia Power Company license amendment proceeding determined that six tape recordings made by Mr. Mosbaugh, which are copies of portions of a larger number of tapes, should be released to Georgia Power Company in discovery. We understand that these six tapes, which by agreement among the parties were to be released on July 2, 1993, were previously made available to the Subcommittee by Mr. Mosbaugh's attorney.

We understand that the Subcommittee does not intend to seek or compel the public disclosure of material compiled by the NRC's investigatory staff that is not already in the public record, or seek public disclosure of substantive conclusions that the investigators may have reached on matters under investigation.

The Director of the Office of Investigations has concluded that public discussion by the Subcommittee of information relating to Mr. Mosbaugh's allegations with either Mr. Mosbaugh or the Georgia Power Company will not adversely affect any current matter under investigation by his office. However, neither the Commission nor its staff will be in a position to discuss either the NRC investigation or any potential effect of the investigation on possible enforcement actions or on the ongoing licensing proceeding.

Sincerely,

Kenneth C. Rogers

Kenneth C. Rogers
Acting Chairman

cc: Senator Alan K. Simpson

Senator LIEBERMAN. Mr. Mosbaugh, I would again ask you to stand if you would and raise your right hand.

[Witness sworn.]

Senator LIEBERMAN. Thank you very much. Thank you for being here today. I would now ask you to proceed with your prepared statement.

TESTIMONY OF ALLEN MOSBAUGH, AMELIA, OH

Mr. MOSBAUGH. I would like to thank the Senator and the subcommittee for the opportunity to come before you and testify on these important issues.

I am a nuclear engineer, a nuclear professional. I have a bachelor's degree in chemical and nuclear engineering, a master's degree in chemical and nuclear engineering, and I have completed coursework toward a doctorate in nuclear engineering. At that point I was recruited to enter into the commercial nuclear industry. There I spent 16 years working for five different utilities.

Coming before this subcommittee and testifying about my whistleblower experiences is absolutely the last thing in the world I would have envisioned that I would have done in my life.

In 1984 I was recruited by the Georgia Power Company to come and become a superintendent of engineering for them. I had responsibility for 60 and 70 of the permanent Georgia Power engineers. I believed it to be a good place to work, and I accepted the job.

Then, in 1988, there was a wholesale management change at the executive level over Plant Vogtle. I moved up in the organization in my career with Georgia Power. I was promoted three times within four years.

At the time that I blew the whistle, I was the second-highest level of management on the Plant Vogtle site, with responsibility for approximately 350 employees, including all engineering and quality control.

Late in 1989 I discovered——

Senator LIEBERMAN. Let me just interrupt you and just say what is obvious for the record. I think this is important to say.

It may be a popular impression that the typical whistleblower is a low-level employee in a plant, but you were right up there in management at this time?

Mr. MOSBAUGH. Yes. I reported directly to the plant manager.

Senator LIEBERMAN. Go ahead.

Mr. MOSBAUGH. Late in 1989 I discovered a violation of technical specifications associated with some valves that I'll just label "dilution valves." I additionally concluded that the violation had occurred willfully and knowingly.

The willful violation of a technical specification or other NRC regulations is a criminal felony.

I drafted an allegation anonymously and I sent it to the NRC. I did not go forward personally to the NRC for fear that somehow my identity, being a high-profile person, would leak back to my employer.

I went so far as to prepare this allegation on a computer handling the document with gloves so that my fingerprints were not on it. I took the envelop to a remote post office and mailed it there.

Additionally, in this allegation I expressed a concern that management's change in attitude towards safety could lead to a major accident at Plant Vogtle. This was in January of 1990.

The initial NRC response to receiving this anonymous allegation was prompt and appropriate. The Office of Investigation initiated an investigation on site doing interviews within 30 days. OI thereafter found and confirmed my allegation that the technical specification was violated willfully.

Then the NRC actions——

Senator LIEBERMAN. Was it your conclusion that willful violation was by another employee or by the management of the——

Mr. MOSBAUGH. It was by other employees—a high-level operations manager and some high-level operations shift supervisors.

Senator LIEBERMAN. If you don't mind—and I don't mean to break the trend of your thinking, but it may be more helpful, just in a few cases, to ask you questions as you are going along—did you at any time consider bringing this concern to the management of Georgia Power?

Mr. MOSBAUGH. I did bring the violation of technical specifications immediately, the same day as I learned about it, to the management. I never brought to the attention of Georgia Power my belief of willfulness.

Senator LIEBERMAN. Right. And the response?

Mr. MOSBAUGH. The response was they sent it through channels. It went to the plant review board. A review was conducted in-house, and it was decided that Westinghouse needed to review it, and then it was decided that corporate needed to review it. Corporate came back and had a very vague determination on it. And so it went about several months of these internal reviews.

Senator LIEBERMAN. Did you notify NRC at the same time you notified management, or did you wait until you were frustrated by management's response?

Mr. MOSBAUGH. I only struck my neck out and submitted an anonymous allegation to the NRC after I had gathered enough evidence to convince me that it had been willful. I would not have notified the NRC of a mere violation without criminal intent.

Senator LIEBERMAN. Okay. Go ahead.

Mr. MOSBAUGH. The NRC actions then slowed. The report became watered down. The willfulness went away. And the NRC eventually issued a civil penalty of $100,000 with a conclusion of no willfulness.

After I had submitted this initial allegation and an NRC investigation had begun within a week or so, I noticed an attitude change toward me. I was invited to a meeting with the general manager in which "backstabbing" was written on the board. I was essentially accused of backstabbing the other top manager, and I was told that I did not support the common resolution and common position of the company.

Senator LIEBERMAN. Let me understand. Did they at that point tell you that they knew that you had filed the anonymous complaint with the NRC?

Mr. MOSBAUGH. They did not tell me they knew, but the manager did come and personally question me as to the source. He asked, "Where did this allegation come from? Why is OI coming?

Do you know where this started? He said it came from an allegation." He was looking for my reaction.

Senator LIEBERMAN. And your reaction?

Mr. MOSBAUGH. I said I don't know. But I'm sure my emotions may have given it away.

Senator LIEBERMAN. But you were convinced that they know that you——

Mr. MOSBAUGH. I was convinced they knew.

Senator LIEBERMAN. Yes.

Mr. MOSBAUGH. I was questioned to the source. I was also responsible for Quality Concerns Department under me, who received hundreds of allegations. This was the first instance where I had ever been queried by my manager as to the source of an allegation.

Senator LIEBERMAN. Let me just ask, because it relates to one of the other complaints we hear from whistleblowers, and something that is suggested in the IG's report, which is: When you went into the meeting and "backstabbing" was written on the blackboard did you conclude that in some way somebody at the NRC had suggested that you had been involved in the complaint even though it was anonymous? Or was it a situation where your coworkers had concluded that only you would have done this because only you were in a position to know about it?

Mr. MOSBAUGH. Senator, I don't specifically know. It could have come from either. I do know that the NRC residents at the plant very shortly began looking into it and gathering information. The observation of personnel of them could have let somebody to believe that the NRC had this allegation.

Senator LIEBERMAN. Okay.

Mr. MOSBAUGH. Then I was in another meeting with the general manager, and the general manager says to me, "Al, I have professional training in the Navy in saying 'Yes, sir.'" He said, "If you can't conform and submit, you need to get out."

What happened next was the Office of Investigations interviewed me on the dilution valves issue. The company attorney represented both me and the company. During the course of that investigative interview we went off the record. I had a discussion with the attorney, divulged information to him about my first-hand knowledge of some things, reasons I had concluded willfulness on this violation, and he advised me not to offer that information up to the investigators. Following his advice, I did not.

With all that having happened in the course of two or three weeks after filing this first anonymous allegation, I became concerned. I only had my oral—these were oral transactions. I only had my memory of what had happened. I had scribbled down a few notes. I felt that insignificant and weak evidence in protecting myself, in documenting my safety concerns, and in documenting these potential harassments of me telling me I had to get out. That's all I had, and I felt that was too little.

I considered the need to get hard evidence—evidence that was unrefutable. I considered tape recording.

I supervised the Security Department, and whenever Georgia Power had a concern about health and safety Georgia Power utilized one-party tape recording to document conversations. In fact,

Georgia Power recorded continuously on numerous telephone lines at the Georgia Powerplant and had for many, many years.

When they had additional concerns, additional one-party tape recording devices were placed on the office phones of many managers and their home phones. Radio communications were continuously recorded, and Georgia Power literally recorded tens of thousands of hours of communications.

I might add that later I found out some of their recording was illegal wire tap.

I had seen a memo prepared by the company law firm that addressed one-party tape recording. That's tape recording where you only record conversations that you are present and party to.

I reviewed this legal memo from the company's law firm, and the memo fully justified and authorized the one-party tape recording by managers.

I reviewed all the policies and procedures, all the security prohibitions and contraband about tape recording—and I determined there was none. I began to make a few initial tape recordings.

On March 20, as you indicated, Vogtle had the site area emergency. That was the very accident that I had feared in my written correspondence with the NRC earlier. A major accident. A total blackout of all safety-related electrical power at mid-loop—only one-third of the volume present in the reactor.

Had that not been mitigated and given the plant conditions of a breached reactor vessel and a breached containment, that would have led to an accident within, in my judgment, approximately 10 hours that would have been far worse than Three Mile Island, and perhaps a hair less than Chernobyl. There would have been major off-site consequences because the radioactivity would have left the containment through a 20-foot diameter hatch.

As bad as the site area emergency was, what I learned after that was even worse. The problems that caused the failure of the diesel generator has been known about for years. This is what I had learned. These problems had not been related to the NRC and the required reporting mechanisms.

Then Georgia Power submitted false statements to the NRC to gain permission to start the plant back up. They had been under an order of shut-down to not resume power operations.

Senator LIEBERMAN. This shut-down order was for refueling, or was it because of the——

Mr. MOSBAUGH. The plant was already down when the accident occurred, so the shut-down order said, "You may not resume power operations until you convince us that these diesel generators are reliable."

Senator LIEBERMAN. Right. Again, the purpose of the diesel generator?

Mr. MOSBAUGH. The diesel generator—a plant is designed to lose its off-site power—a tornado, lightning strikes. Upon the loss of that, the diesel generators must supply the electricity for all the safety-related equipment. The plant runs on electricity.

Senator LIEBERMAN. Right. And in this case—just go back over it, because you said obviously some haunting, unsettling things—comparisons to Three Mile Island, or even close to Chernobyl. What do you mean? In other words, I indicated that——

Mr. MOSBAUGH. I'll indicate the progression of the potential accident if it wasn't mitigated.

Senator LIEBERMAN. Yes.

Mr. MOSBAUGH. The reactor core began to heat up upon the loss of the diesel generators which provided the cooling pumps.

Senator LIEBERMAN. That's the key. That constantly needs to be cooled.

Nr. MOSBAUGH. The heat you indicated earlier is constantly generated. Not even God can stop that. So the water heats up.

Only one-third of the normal volume was present. The water inventory cooling the core is one-third normal so things will happen faster. The water begins to heat up. The reactor vessel—some of the hatches are off, and the containment hatch is off.

The water heats up to boiling. Within an hour or so it goes to boiling.

Senator LIEBERMAN. It went up 50 degrees in—what was it?

Mr. MOSBAUGH. In 30-some minutes. It started at 100. It only needed to go another 100 to boiling. Then it boils. Then steam belches out these hatches. The whole containment fills up with steam and becomes a 212-degree environment. Nobody can do anything in there. Nobody can mitigate.

Then the water boils away, like a pot boiling down. The top of the core goes high and dry. After the water drops several feet the rods themselves would go to red heat, could pop, fail. Then millions upon millions of curies of radioactivity would come out, go right out with the steam into the containment, right our the containment out the hatch to the public.

It would have been horrid.

Senator LIEBERMAN. And that would have taken 9 or 10 hours by your estimate?

Mr. MOSBAUGH. In my estimation. Again——

Senator LIEBERMAN. If the diesel generators or some other source of power to start the coolant moving to reduce the temperature had not been working?

Mr. MOSBAUGH. That's correct.

Senator LIEBERMAN. Okay. Why don't you go ahead.

Mr. MOSBAUGH. These false statements were important. They were false statements about the key component, the diesel generators, and its failures. And some of the failures that had occurred, contrary to what Georgia Power told the NRC, were from the very Calcon switches that had caused the site area emergency, itself.

After they submitted the first written correspondence to the NRC, I informed them—and they acknowledged—that that first written correspondence was false and incorrect.

There was a second written correspondence. I put them on notice that the first one was false, and I put them on notice that there had been these failures.

They went ahead and signed out the second written correspondence just like the first with the same words, "No problems or failures have occurred on any of these starts." They did that after I told them that was false. I told them the dates and times of the specific failures, and I told these to important and high-level corporate people who were responsible for writing these LERs.

Senator LIEBERMAN. Is this recorded on the tapes that——

Mr. MOSBAUGH. Yes, it is.

Senator LIEBERMAN. Do you want to—do you have those with you?

Mr. MOSBAUGH. Yes, I do.

Senator LIEBERMAN. Do you want to play them? Again, I'd say, if you do, that we are not—we can't at this moment testify to the accuracy of the tapes; is that correct? You testify that they are accurate. I gather that they have been entered. They have been listened to by the company. Do you know the company's reaction?

Mr. MOSBAUGH. No, I don't.

Senator LIEBERMAN. I'll wait and ask the representative.

In the interest of time—and I know this is not easy—I hope you can focus in on the key sections here.

[Transcription of Mr. Mosbaugh's tape recordings follow:]

Voice 1. The next page, on the 20 starts

Voice 2. Yea, Yea, Yea.

Voice 1. I'm struggling with that one.

[Senator LIEBERMAN. Do you want to describe what we've got?]

Voice 2. You struggle with that, one, huh?

Voice 1. I am struggling with that one. I'm trying to verify that still.

Voice 2. Okay, All right.

Voice 1. Okay, uh, We think that's basically a material false statement.

Voice 4. Really?

[Senator LIEBERMAN. Is that you, Allen?]

[Mr. MOSBAUGH. No. That's the man that works for me. I'll speak later.]

Voice 1. Yea, well, we know for a fact that the B diesel tripped at least once after March 20th.

Voice 3. Actually it tripped twice after March 20th, or it had at least two separate problems.

Voice 2. Well, do we need to take this more than 20 times each out then?

Voice 1. That's what we are thinking. I've got Tom Webb reviewing the vh, reactor operator's log and counting.

[End of tape recording.]

Mr. MOSBAUGH. This is a conversation between me, a man that works for me on site, and a corporate representative who was preparing this document to be signed out to the NRC.

At this point, we have put him on notice that: one, we think it is a material false statement——

Senator LIEBERMAN. The statement that had earlier been made in the response of April 9, 1990?

Mr. MOSBAUGH. No. We are actually talking about a new statement that is going to be made.

Senator LIEBERMAN. Okay. But this conversation occurred—am I right?—after that letter was written?

Mr. MOSBAUGH. After that letter was written, but before the second response was signed on.

Senator LIEBERMAN. Second letter. Right. And the consequence of all this is that it was on the basis of these representations you are saying that the NRC gave the company the authority to restart the facility?

Mr. MOSBAUGH. That's correct. And certainly these statements are the core of the basis of the decision.

[Transcription of Mr. Mosbaugh's tape recordings follow:]

Voice1. You there still?

Voice 2. I'm here.

Voice 1. We don't know yet.

Voice 2. We don't know yet. But now, you know, I just—it—It just dawned on me what Allen was saying a minute ago. In other words, if we say "and No failures or problems have occurred during any of these starts," you you're saying that that's not true?

Voice 1. Yes. I'm saying that's not true.

Voice 2. Oh Wonderful. Okay.

Voice 1. Which is also telling you that—It's telling you something else, I imagine. Because you know we, this has been written to the NRC once already.

Voice 2. Yes. I know. That's exactly what I was thinking.

[Senator LIEBERMAN. That's a reference back to the letter.]

Voice 1. I'm working on that.

Voice 2. All right, John. Okay. Well, I'll be patiently waiting, or impatiently waiting, or however you want to look at it.

Voice 1. Well, I must be off.

[End of tape recording.]

Senator LIEBERMAN. Okay. So your concern here—and, again, this goes—at the heart of the NRC's ability to function properly is the truthfulness of statements and the relations between the licensees and the NRC, so this is a serious allegation that did have consequences, and you, as a whistleblower, were in an obviously unique position to break through it.

Do you want to go back to your statement?

Mr. MOSBAUGH. I can play one other segment, or I can resume.

Senator LIEBERMAN. Do you think it is helpful to play one other?

Mr. MOSBAUGH. At this point it has gone one level higher in corporate—yet another man above them.

Senator LIEBERMAN. So this all led to a second correspondence. I'm, looking at the chart. That was on April 19th, am I correct?

Mr. MOSBAUGH. Yes.

Senator LIEBERMAN. And after these conversations occurred that you have just played for us. Do you allege that the representations made in the April 19th correspondence were either untruthful, or at least incomplete?

Mr. MOSBAUGH. They are equally false.

Senator LIEBERMAN. Okay. Why don't you go ahead with your statement.

Mr. MOSBAUGH. After the April 19th I pursued getting the statements corrected. I issued written memos to my management alerting them to the statements being false.

As an acting chairman of the Plant Review Board—that's the plant's on-site board that reviews safety issues—I issued an action item to the general manager to correct the first document.

The very next day I was removed from the Plant Review Board and all my job responsibilities were removed from me. I had nobody working for me, and I was told to report directly to the general manager.

If you recall, when I first came to Georgia Power I had 60 or so employees working for me.

Senator LIEBERMAN. I do want to state for the record that you have submitted a copy of your note of April 30, 1990, in which you make these statements—the ones that you just referred to.

Mr. MOSBAUGH. Yes. I submitted that.

Senator LIEBERMAN. I just wanted to indicate that we have seen that. Right.

Mr. MOSBAUGH. Based on my removal from the Plant Review Board and my removal from all my job responsibilities that I previously held, I felt I had been discriminated against for making safety allegations and pursuing my concerns.

Early in June—around June 6th—I filed a complaint with the Department of Labor. On June 13th I initiated meetings with the NRC Office of Investigations, wherein I gave them allegations that I had been drafting in the time frame that some of these events were occurring. I had utilized some of my tape recordings to draft those detailed allegations.

On June 13th I gave the NRC all that documentation and gave them oral testimony.

At this point I did not tell the NRC of the existence of my tape recordings. Like with my anonymous allegation, which I didn't even put my fingerprints on, I knew that tape recordings could be high profile, that people would learn and know about them. I already believed Georgia Power suspected me as a whistleblower. They certainly would link the two.

I was pursuing these issues in-house. They certainly would link this up. And I felt that if I did that I would not be able to complete the job of documenting these concerns to their completion and their ultimate correction, which took until late August.

Then, as the Department of Labor proceeding proceeded, it comes to a point where depositions are taken. In those depositions, which were in early September, I told Georgia Power of all my protected activity, which had included the tape recordings. I told them of my tape recording activity.

Georgia Power immediately tried through the legal process to get possession of the tape recordings. When I learned of that, I contacted the NRC and I made arrangements to turn all of my tape recordings over to the NRC, and an individual from the Office of Investigations received those from me as evidence. That happened on September 13th.

I knew it was wrong that Georgia Power should have these. Georgia Power should not have this evidence. This evidence had to be in the hands of law enforcement.

As soon as Georgia Power learned that I had turned these tape recordings over to the NRC, two days later I was suspended, and three weeks after that I was fired with no additional communications. I was suspended and fired for making the tape recordings.

I want to indicate not only the importance that I have already indicated about the physical issues here, but about the issues of trustworthiness and the issues of the people that would make false statements to the NRC and that would harass and discriminate against individuals.

These people are the highest level, and some of the most powerful members of the nuclear industry. They are responsible for the operation of six nuclear powerplants. But, additionally, a number of these individuals are key members of the Advanced Reactors Consortium—the utility group that is proposing to usher in the next generation of safe nuclear power plants.

I am a nuclear engineer, a nuclear professional. I followed my nuclear training—document, document, document. No detail is too small that it doesn't make a difference. That was Georgia Power's supposed mind set.

I followed my conscience. I am proud of what I did. I did the right thing. I didn't do it to benefit myself. I would have never done it if it hadn't risen to the level of being criminal. I had to do it. They had crossed the line.

I am a very good engineer, and for blowing the whistle and doing the right thing I lost my job, I lost my career. I have been unemployed since. I live off my wife's salary of $24,000, who now has to work full-time to support me and my four school-aged children. I fear for my family's future. My dreams are broken.

Senators, this law is broken, too. It doesn't work. The burden for the individual is too great. The climb is too long, and the mountain is too high.

Thank you, Senators, for this important opportunity to testify.

Senator LIEBERMAN. Thank you, Mr. Mosbaugh. I know that was difficult for you, and I appreciate the sincerity and the strength of your feeling, and I know what you have been through.

Again, without reaching judgment on the merit of the various claims you have filed, nonetheless it does appear to me that certainly the topic about which you were blowing the whistle was a very serious one that had serious consequences. In fact, ultimately it was corrected, as you had based. It was corrected as you had desired; is that right?

Mr. MOSBAUGH. They issued a correction, and ultimately they also fixed the underlying problem with the calcon's, which is not—they didn't do it until it has failed again seven more times in May, and it has become essentially a complete embarrassment. And they didn't do it only until after I was raising a big stink about it.

Senator LIEBERMAN. The date of the incident that we have started this story was March 20 or 21; is that right?

Mr. MOSBAUGH. The 20th.

Senator LIEBERMAN. The 20th of March 1990. And when were these problems that were the basis of your complaint——

Mr. MOSBAUGH. The physical design changes—and we are only talking about hardware—the physical design changes of eliminating these defective switches that caused the diesel to trip were instituted in about June.

Senator LIEBERMAN. Right.

Mr. MOSBAUGH. Obviously, the rest of my concerns about the integrity of individuals and making false statements has yet to be corrected.

Senator LIEBERMAN. Yes. So I guess the question that I was going to ask you really has been answered, but that is to say, in regard to the whistleblower process, that you clearly feel that, as a result of having blown the whistle about something that you felt

was a very serious safety problem, you were harassed and ultimately lost your job. But I take it that you feel that the governmental process let you down, too.

Mr. MOSBAUGH. It is amazing, but the governmental process was most effective when I submitted the concern anonymously. After it was known that it was me and a whistlebower it has gone much more slowly.

Senator LIEBERMAN. Say a little bit more about what you mean. In other words, the NRC responded rapidly——

Mr. MOSBAUGH. To a piece of paper.

Senator LIEBERMAN [continuing]. To a piece of paper about the safety——

Mr. MOSBAUGH. About the first safety concern with dilution valves.

Senator LIEBERMAN. Right.

Mr. MOSBAUGH. Of course, later that also slowed down. But when I came to the NRC in person, a reputable and knowledgeable professional, with detailed information, documentation, logs, oral testimony, highly-accurate, the process on that—the NRC has yet to issue any action of fine or civil penalty on the failure of the diesels in the site area emergency, on the making of the false statements to the NRC, in a verbal presentation, in these written communications on the know and repeated failures of thee switches. They have yet to issue any enforcement action, or against any of the individuals that are implicated.

Senator LIEBERMAN. And in your own case, in terms of your own position, which occurred through the Department of Labor, I gather you made the allegation and were not successful, that you were retaliated against?

Mr. MOSBAUGH. Initially the Department of Labor ruled in my favor and ordered me reinstated. The Georgia Power Company appealed that first step. It went to the second step, and was recommended that my complaint be dismissed.

My complaint and that recommendation is currently before the Secretary of Labor.

Senator LIEBERMAN. You are on appeal, so that is not over. And the question there is—and you correct me if I'm wrong, and I'll ask the company, as well—is whether the company had the right to terminate you based on the taping that was done? Is that correct? Their allegation is that they terminated you because of the taping.

Mr. MOSBAUGH. That is the reason why they say they terminated me.

Senator LIEBERMAN. Right. And, of course, your allegation is that you were terminated because you filed the complaint?

Mr. MOSBAUGH. That's correct.

Senator LIEBERMAN. Because you blew the whistle.

Mr. MOSBAUGH. And because I gave the evidence to the NRC.

Senator LIEBERMAN. Right. Time is moving on. I note that Senator Alan Simpson, who is the ranking member of the subcommittee, is here. Before hearing from the company, I would yield to him for any statements or questions that he might have at this time.

OPENING STATEMENT OF HON. ALAN K. SIMPSON, U.S. SENATOR FROM THE STATE OF WYOMING

Senator SIMPSON. Mr. Chairman, I thank you. I won't take long. I know I am in the midst of this activity. I am involved in two other hearings and work on the floor, and no one knows that better than those of us who serve.

But I thank you, Mr. Chairman, for holding the hearing. Obviously, whistleblowing is a serious issue. No one would dispute that in Government.

I want to commend you for your leadership in this subcommittee in raising these issues of concern bearing on the public health and safety. This is the third hearing now we have held this year on bringing forth important issues of nuclear powerplant security and other issues, especially in regard to recent terrorist activity. There will be more of that—more activity in that area—until we resolve our own domestic policies with regard to immigration and refugee issues.

I do commend you. I regretted that I wasn't at the authorization hearing, because we haven't done that for some time. So I appreciate your initiative.

I have been on this committee for 14 years. Nothing we do is taken lightly. We are in an area of emotion, fear, guilt. We labor in it all day long. The duty of the NRC is to protect the public health and safety, and they do quite a job of it.

There are mechanisms within the NRC to deal specifically with the issue that you are dealing with today. I don't want that to go unnoted. There is a procedure within the NRC to handle just this type of activity. We are not interested in seeing people and industry get away with something. That is not what we are here for. We are not interested in seeing people destroy the domestic nuclear power industry. That's not what we are here for.

There are 111 reactors, and whether we like it or not we've got to see them work. We want to see things happen that are up front and above-board as to—either you like nuclear power or you don't. If you don't, say so and then get up here and rip and snort. If you do, support it.

I have said 150 times right here that I'm just as tired as the people who say, "Hell, no, I won't glow" as those who say, "Nobody has ever been killed." They are both stupid. So I have to guide around somewhere in the middle of those two remarkable views.

But I am aware there are volumes of documents and tapes, and I hope we can keep separate the issue of your litigation and what we are trying to do here. This is critical. It is not a place for evidence and tapes. This is not the place.

I am here to discuss the process, and I'll help this chairman in any way, but I won't be part of listening to this thing being litigated for the media. This is not a seven-camera hearing, only three. And I think we want to be very, very careful about that.

I feel very uncomfortable. I practiced law for 18 years. This issue is being litigated. It is in a highly controversial arena. Where is the other side? Where is the Department of Labor? They were the ones with the primary part in this. I would ask: Have they even been invited? Where are they?

The first function on the long step here was with them. I don't see them here. I have learned long ago in my legislative activity there is no good in having one side presented.

When I chaired the Immigration Refugee Subcommittee I said to my staff, "Go get me the toughest cookie on the other side of this issue and bring him in here and let's hear him. Let's be able to ask him questions. And go find the ones that are the worst and most egregious and even offensive opponents." That's the only way to hold a hearing.

So I am wondering about that. I am wondering about the timeliness of the IG report. What is the stimulus of it suddenly arising? Is it this? I don't know. Good question. But it is troubling to me because obviously these things are not simple. There is no simple remedy. If we correct one area, what do you do on the other side? Modifications with the process need to be balanced and weighed carefully.

What are we really looking at? Is this the norm in the industry? Does this happen all the time? It doesn't.

A majority of these cases are successfully resolved, and there are a lot of them. Unfortunately, we don't read about those. I think these are very sensitive issues due to pending proceedings, and I think we have to focus on the broad policy issue.

I have very strong concerns, Mr. Chairman. I should have shared them with you personally before, but things move along. But I do not think that it is appropriate for this subcommittee to provide a forum for plaintiffs or defendants to publicly litigate the details of pending cases under consideration in various administrative and judicial forums.

Knowing Joe Lieberman as I do, I believe he would feel the same. So if we are going to have this, let's stick with what it is we are trying to develop, and that's the process, and not get into the emotion and the heartbreak and the anguish of what this man has gone through. That's a subject of a separate place.

This is going to be highly prejudicial to all concerned if not done in a very sensitive way. There will be compromises all along the line in this one, and no wonder people want to appear or don't want to appear—because of that. That is a poor way, in my mind, to do the Nation's business.

Senator LIEBERMAN. I thank my friend and colleague. Because we are friends and colleagues and have a good relationship I do want to briefly—and I value his involvement and experience in this committee—I do want to briefly respond to a couple of the points you have made.

The first is that the IG report is actually a response to a request that I made—it appears to me to be almost a year ago—before I came to the chairmanship of this subcommittee. And the request was based on my own surprise at the number of whistleblowers in Connecticut who had come to me with concerns about how their complaints were being processed by the timeliness of that. So it is that really that engendered the report.

On the second question—a very sensitive question—which is: how to bring forward the relevant testimony of whistleblowers about their experience without compromising other proceedings going on. I just do want to state—and I'll share it with my friend—

that I did have at least a letter from the NRC indicating that they felt that proceeding with this testimony both by Mr. Mosbaugh and Georgia Pacific would not compromise the matters that are currently before the NRC.

I do want to indicate again that I stated at the outset, and again before Mr. Mosbaugh's testimony, that our function here was not to reach a conclusion on the merit of his case, but to try, through his sharing his experience and hearing the same from Georgia Power, to have some sense of how this process has worked.

It happens—and, again, I will be happy to hear other testimony on it—that both Mr. Mosbaugh and Mr. Blanch blew the whistle in a way that ultimately led to changes that say that at least the underlying complaint that they made about the fact that there was a safety problem was correct because it was acted on—in some cases in rather short order—once they blew the whistle, which was my way of trying to show that these were complicated plants.

I said, Alan, earlier that this shouldn't be taken as a pro-nuclear or anti-nuclear hearing. It is really a question of public health and safety.

I don't mean to put words in the mouths of these two whistleblowers, but these are people who are trained in this field. I don't want to say that they are pro-nuclear, but they have lived their lives in this field. They are committed to it, so they are not anti-in that sense.

Mr. MOSBAUGH. Senator, if I may speak, I am pro-nuclear.

Senator LIEBERMAN. Yes. And, finally, on the Department of Labor, it is a good point. I guess the answer to it is that we didn't call them because of time constraints because I wanted to hear these two, hear the IG, hear the NRC, and hear the nuclear power industry, and still get home by sunset tonight.

But I do think you make a good point. We probably should bring in the Department of Labor at a subsequent hearing to hear how they proceed on this.

Senator SIMPSON. Well, Mr. Chairman, I have deepest personal respect for you, and I say I feel remiss that I didn't get an opportunity, but I didn't know what course this was going to take. I was doing these other things, and then, because I said, "Would you please monitor the committee," and then when I heard that the tapes were being played I think that's inappropriate, sir. I do not believe that is part of what we are doing here, and I say that with most complete respect and admiration. I do not believe, if we are going to due process, tapes do not fit here.

Senator LIEBERMAN. Understood.

Do you have any questions of Mr. Mosbaugh or should we go on to——

Senator SIMPSON. No. I think that there are many questions I have, and the first is to just say that I can understand your pain and your anguish and your frustration and irritation. I have looked back through the records and I find how long this has been going on and how you talked with your supervisors and how they said, "Notify the NRC" in July of 1990 after you said you didn't want to work with Georgia Power in addressing your concerns.

Do you not recall a meeting with your plant general manager giving you a written notice directing you to "immediately notify the

NRC of any legitimate concerns that you may not have identified." And he said you should give that assignment your immediate and highest attention, didn't he?

Mr. MOSBAUGH. I recall a meeting that you reference, and that meeting, of course, only occurred after I had filed my complaint with the Department of Labor and had exposed my concerns. Of course, at that point I had already gone to the NRC.

Senator SIMPSON. And after you filed several complaints with the Department of Labor, after you had been openly working with the NRC to raise issues, without involving your management, that the company advised you it would assign you to your first career choice, manager-in-training, senior reactor, operator license program?

Mr. MOSBAUGH. Yes. Again, I would like to note that action by the company only occurred after I had been removed from my previous jobs, only after I had filed the case with the Department of Labor and the Georgia Power Company needed an explanation to give to the Department Labor as to why they had no future plans for me. They had put me in limbo. They had taken all my responsibilities away. And, indeed, they told me time and time again that it made no sense to send you, Al Mosbaugh, to SRO school.

But only after I filed the case with the Department of Labor on June 6—what you are referring to occurred in early July. Only then did the Georgia Power Company flip-flop, change its mind, and say, "Now, Al, you are going to go to SRO school. That's what we planned for you all along." That was the explanation that they gave to the Department of Labor to explain their previous actions.

Senator SIMPSON. Let me ask you a final question.

I understand that before you filed your first Department of Labor complaint in June of 1990, and even before you signed your confidentiality agreement with the NRC that same month—correct me or interrupt—that your lawyer spoke to Georgia Power Company's lawyer about your claim?

Mr. MOSBAUGH. I have no knowledge, Senator, of that event. I have the knowledge that Georgia Power, in my hearing, claimed that occurred, and they indicated they—the one who testified indicated that he had no first-hand knowledge of that either.

Senator SIMPSON. Apparently a Mr. Dahlberg, who is here to testify today—is that correct?

Mr. DAHLBERG. Yes.

Senator SIMPSON. In looking at his testimony, it would indicate that your lawyer sent a copy of the Department of Labor complaint that he threatened to file, and said he had concerns that you had still not raised with the NRC and that your lawyer made it clear that things could get expensive and difficult, and that he offered—I assume perhaps on your behalf—certainly as a lawyer would—that if Georgia Power wanted you "out of their hair for good" that could be accomplished by some compensation. At least that is a part of Mr. Dahlberg's testimony. The offer of $445,000 to get out of the company's air—that was explained as $100,000 in attorney's fees and $345,000 for you—and, in exchange, no filings were to be made at the NRC or with DOL.

Did you authorize your attorney to make that offer? Do you——

Mr. MOSBAUGH. Senator, I did not authorize my attorney to make that offer. I have no knowledge of what you are speaking of. I would further indicate that I would not drop my allegations with the NRC. And, in fact, I was aware and am aware that this committee was an important influence in lawmaking that made a ruling that employees couldn't or shouldn't dismiss complaints with the NRC based on any settlement.

Now, maybe there is some confusion here, but you must know that there was a settlement initiative made by the Department of Labor, the investigator, Franklin Pierce. He approached my attorney, and I believe he approached the other attorney about some settlements. It is my understanding that is what he is supposed to do, and that is recommended as part of filing claims with the Department of Labor.

Yes, Mr. Franklin Pierce did make that initiative. Now, maybe there is some confusion with that event.

Senator SIMPSON. Well, I'm going to cease. Mr. Dahlberg is here. But this is part of the peril. I wanted to ask you that question, because this is the peril of litigating in a hearing. You don't have your lawyer here. Mr. Dahlberg doesn't have his lawyer here. We are going to hear controverted and controverting evidence of all types and amounts, and no ability to cross-examine, no ability to present evidence, no ability to do anything except appeal to emotion for fear or guilt.

Mr. MOSBAUGH. I would like to indicate that Mr. McCoy testified about what you have just alleged.

Senator LIEBERMAN. Would you identify who Mr. McCoy is?

Mr. MOSBAUGH. Mr. McCoy is Southern Nuclear Vice President over Plant Vogtle. He is Mr. Bockholt's boss. He testified about this in the Department of Labor hearing—about my allegedly attempting to get a buy-out. And he said in his testimony, he admitted that it was a far-fetched idea of his that that was a motive of mine. That's his testimony.

Senator SIMPSON. I say, sir, that's what happens in these kinds of hearings without appropriate counsel. If you can do it, others can do it. It is not a good place to do it. That's a good saying.

Mr. MOSBAUGH. And his comments are on the record.

Senator LIEBERMAN. Mr. Mosbaugh. Thank you. Thank you for your testimony. We wish you well.

Mr. MOSBAUGH. And thank you.

Senator LIEBERMAN. Thank you.

We'll now call Mr. Dahlberg, who is representing Georgia Power Company.

Mr. Dahlberg, again, as we have done with the other witnesses, please raise your right hand.

[Witness sworn.]

Senator LIEBERMAN. Thank you, sir. We appreciate your being here.

As indicated, for the record, although we are pursuing the process, because the process of handling whistleblower complaints inevitably will intersect with the specifics of the complaint, in this case serious both as to the technical problem with the generators that Mr. Mosbaugh referred to, but also as to his allegation, which was based on the tapes, that there was a willful concealing of infor-

mation by Georgia Power, we very much wanted to give you the opportunity to testify both in response to the specific facts and to anything you want to say about the process of handling whistleblower complaints, as well.

We welcome you and look forward to your testimony.

TESTIMONY OF A. W. DAHLBERG, III, CEO, GEORGIA POWER CO.

Mr. DAHLBERG. Senator, thank you. I appreciate the opportunity to be with you.

For the record, my name is Bill Dahlberg, and I am president and CEO of Georgia Power Company, a position I have held now for about five and a half years.

I do appreciate the opportunity to be here to address this subcommittee and to give you my perspective on this issue.

I do want to spend most of my time talking about the process. I'll tell you a little bit about the environment at Georgia Power Company and how we try to operate. I'll tell you a little bit about this event—not as much about the technical merits of the issue, because I do think there are other forums that more properly address that, but I would like to describe the actions that I took with respect to this incident.

I made the decision to fire Mr. Mosbaugh, and therefore I think it is appropriate that I be here to give you my perspective on the entire issue.

Senator LIEBERMAN: You were the CEO at the time at which these incidents occurred?

Mr. DAHLBERG: That is correct.

First of all, I guess I would say that I am here because I am proud of our company. I am proud of the people that we have at our plant, the management that we have there. I think we have a team of professionals that run our plant in a professional manner.

The operating statistics of our plant are good and solid and have improved significantly over the last several years. The ratings that we get from NRC are clearly superior. I think we run a good ship, and I am proud of the people that make that a reality.

So I am here really to talk on their behalf about what they have done at that plant, and a little bit about the environment we have to raise issues, raise concerns, and how we seek to address them professionally, as we know how to do.

I don't believe our system at Georgia Power Company is broken. I believe our system at Georgia Power Company does work.

I do think that the industry and its employees have recognized that they have a vital and mutual stake in the free flow of information, of safety-related information at the plant. I really think that's just enlightened self-interest.

Responsible licensees, including us, have made it clear to each employee that the raising of safety concerns is not an opportunity, it is an obligation.

Georgia Power Company has a management philosophy of openly, frankly identifying and communicating potential problems in order to resolve problems at the earliest possible state. We, in fact, maintain a problem list. The way we manage our facilities to im-

prove is to maintain a problem list—not a list of things we are doing well, but things we can improve on. And we communicate that throughout the plants. It is the philosophy of ours to deal with problems to make our operations better. That's a philosophy in all that we do—to improve the margins of safety, and also the efficiency of the plants that we own and operate.

The plants have several systems for rating concerns. We have something called a deficiency card system. It is an established method for plant employees or managers to document and notify their supervision of potential quality and safety concerns at the plant level.

We also operate a quality concern program dedicated to accepting and investigating nuclear safety and quality concerns. Yes, those concerns can be submitted anonymously.

Separately from that program, but really as a result of the success of the concerns program at the plant, we also have a corporate concerns program so that any employee, including employees at the plants, can raise a concern at levels reporting directly to the senior officers and our company, but outside of their normal chain of command.

I personally review with the manager of that department issues that are raised by employee through that concern program every three weeks.

I guess the other thing I would say to you is that employees can and do contact me directly by phone or by mail to discuss the issues that they want to discuss. If I am there and available, I talk to them about those issues.

Finally, the company maintains and encourages, both at the plant and the corporate level, open and frequent communication with NRC and the resident inspectors.

I don't intend to rehash all of the allegations and claims that Mr. Mosbaugh made against Georgia Power Company. I simply prefer to say that he is not a victim of company reprisal. Instead, his actions demonstrate I think an aberration—an employee who abused the system for personal advantage.

The company repeatedly responded to each of Mr. Mosbaugh's concerns in honest and straightforward effort to fully resolve the concerns as soon as possible.

In the summer of 1990 Mr. Mosbaugh, the Georgia Power general manager and the NRC resident inspector met at the request of the general manager. At that meeting Mr. Mosbaugh was directed to articulate for the benefit of his employer and the NRC all of his safety concerns. He indicated difficulty in formulating those concerns.

So a manager outside his chain of command was assigned to work with him to collect information to fully develop all of his concerns. When, just a week later, Mr. Mosbaugh indicated reluctance to cooperate with this manager, he was instructed in writing to take his concerns to the NRC rather than inspector.

Senator LIEBERMAN. I'm sorry. Could you tell me again what the time of these meetings was?

Mr. DAHLBERG. In the summer of 1990.

Senator LIEBERMAN. Okay. This was after the incidents that he has testified to in March of 1990?

Mr. DAHLBERG. That's correct.

That was made his top job priority—to take those concerns to the NRC.

The point here is that Georgia Power didn't just encourage Mr. Mosbaugh to do that. They didn't make it just the corporate philosophy. But, in fact, they mandated that he do so, and he wasn't punished for that activity.

I did make the decision to terminate Allen Mosbaugh because he ignored a trust placed in him by his fellow workers and destroyed the open, candid, and free flow of communications at the plant. He conducted a six-month long covert operation in which he secretly and continuously taped conversations with virtually every person he came into contact with.

Simply put, I fired Allen Mosbaugh not because he blew the whistle, but because his actions of secretly taping conversations clearly jeopardized our goal of maintaining open and free-flowing conversations that I believe are vital—absolutely vital—to assuring the safety of our employees and the public.

I guess if I were giving you some comments on flaws that exist—and I think there are some—going through all of the incidents that we have gone through, there has not yet been a finding of any willful violation. There has not been any final DOL finding that didn't uphold what the company did. But here we are, three and a half years later, still dealing with the same issue, and that issue has not been resolved.

There are so many forums, so many people involved, that the time it takes to resolve it is frustrating. It is impossible—not just for the whistleblower, but for the company, as well, for the other employees, as well. So there is a frustration. There is something that needs to be done.

There are too many forums, too many procedures, too many mechanisms, too much time to try to resolve these issues.

Senator LIEBERMAN. Once somebody files a complaint, in other words, or once somebody blows the whistle, it is taking too long to resolve, in your opinion?

Mr. DAHLBERG. It may not even be just blowing the whistle. It may be raising an issue of concern that needs to be resolved.

I'll say this: when somebody raises an issue with us at the plant level through our concerns program we deal with it immediately. But once it goes beyond that and there are other forums, other agencies, other procedures, time goes on.

The other flaw that I will comment on—and it is a difficult one—there is a very great difficulty in distinguishing the person who raises legitimate, honest safety concerns from one who does it for personal gain. That's another issue. It is another flaw and another difficult thing to deal with.

I believe that Georgia Power Company has taken the right actions in this case. I won't discuss the merits of the technical issues, but I will say again that there has not been a finding of any willful violation on the part of Georgia Power Company. We create an environment to deal with issues. We want to deal with issues. It is in our interest to do that. We must resolve them.

So I will say to you that we are running a good shop. It is unfortunate that this incident comes up, and it is unfortunate that three-and-a-half years later we are still dealing with that same.

I am anxious to get on with it. We are running a good plant, and I want it to be demonstrated.

Mr. Chairman, I do think you for the opportunity to be here. I didn't want to be here either, but I do think that since it involves our plant and I think we do have a group of good employees there, dedicated employees, professional employees that are dealing with concerns and trying to make our plant one of the safest in the world, I had an obligation to be here, and I appreciate very much that opportunity.

Thank you very much.

Senator LIEBERMAN. Thank you, Mr. Dahlberg. We wanted to give you that opportunity.

Clearly, in telling his story Mr. Mosbaugh made some serious allegations here, and I accept your desire to essentially deny them and not go into great detail on them—particularly in regard to what happened to him after he made the complaints.

I am going to try to tread a thin line here, because basically I wanted you to come and have the opportunity to respond.

But my question is, if you are comfortable in responding to it, about these two technical problems that he says he brought to light about the dilution values and them about the diesel generators, which is the one that seemed most graphic to me as I was listening to this matter—the question that you need these back-up generators to keep the coolant moving through the facility, or else there is a danger that it would overheat.

His testimony impressed me on the point of the importance of encouraging people within a plant to raise concerns that they have about safety because the NRC just can't be everywhere, and these folks are on the line. They are experts in this field.

Let's focus in on the diesel generator problem. In fact, I gather from his testimony that some of the concerns he had, leaving aside the whole question, which you have denied, about what was said to whom when—but the concerns that he raised were, in fact, ultimately responded to beginning in June, and then in August, and this physical, technical situation was, in fact, corrected.

Mr. DAHLBERG. Mr. Chairman, we would respond to concerns that were raised by any employee to try to resolve them. If an issue was raised by someone we call a whistleblower, or any other employee in our plant, regardless of level, from the general manager down to the first-day employee, we would try to resolve those. And if we find merit in the specific issue that is raised, certainly we would deal with it.

The specifics in this case and gone on for a long time. I guess the difficulty in responding is the fact that there were many tapes. I haven't heard those tapes. In fact, people at our company haven't heard those tapes until very, very recently.

The tape that was played here this morning we received on July 2nd of this year, even though that tape was done in 1990.

It is difficult for me to respond to a specific on a tape, for example, when that tape was done two-and-a-half years ago and we get

the tape on July 2nd and I hear it for the first time 30 minutes ago.

Now, it is my view that perhaps there was a statement that was filed that may have had inaccurate information, but I will tell you that there has not been a willful violation. In my listening of the tape the people were seeking clarification to make sure that accurate information was filed.

If you want to take the time listen to every single tape to make sure we have the contents correct, I think that's a fair thing. But if we are talking about the specifics, I just don't think I am capable of doing that.

Senator LIEBERMAN. I don't need to pursue that. I do want to state for the record that the tapes are now a matter of public record, and we did play them. My staff played them for some some of your folks in the last week or so, but I have no reason to doubt your statement that you have not heard them before. I accept that to be absolutely valid.

Mr. DAHLBERG. Senator that is correct. The first time we got that tape was from your staff, as a matter of fact.

Senator LIEBERMAN. Right. And we wanted to do that in fairness.

Let me just see if I can rephrase just briefly the question—and, again, leaving aside this process. On the specific question of the concerns that Mr. Mosbaugh expressed about the diesels generators, is it fair to say that he had a good point? This leaves aside the question of retaliation of firing or any of that.

Mr. DAHLBERG. Sure. Any time you have an outrage at a plant and you have an incident like the one that we had, issues that are raised with respect to any safety system are important. So I'd say yes, the issue is important.

I have no question whatsoever that the issue shouldn't have been raised. The issue should be raised. The issue should be dealt with. If improvements should be made in the safety system, they should be made.

In all cases that I know of, that's exactly what happens.

Senator LIEBERMAN. Okay.

Senator Simpson.

Senator SIMPSON. Mr. Chairman, I thank you.

If the primary focus of the hearing—and I deeply believe the chairman—is to focus on the process and the timeliness of the process, I commend him, as I surely am doing, and I know that's what he started out to do.

But obviously this case is one of timeliness, and I pledge to you, Mr. Chairman, to help with legislation to somehow bring this to a focus where we don't have something languishing with the Department of Labor for three to five years. This is stupid if we are talking about health and safety. And the record up there shows that sometimes it takes five years.

I'd love to get the Department of Labor in here by the nape of the neck and ask them why it takes five years to do this. And then, when they finish, it has to got to go to the NRC.

Where do we think this is going to lead? All of us who practice law know what happens with witnesses and their memory and every other aspect of litigation when it is stalled out. You can't do

this. I will pledge to help you with the process, and I know that we will draft something appropriate that we can both support.

Yes, we can obtain more resources, and yes, then it will come at the expense of other safety issues, but I think we want to remember the NRC, as I understand it, is undergoing a comprehensive review to try to better this process. They are in it right now, and the review will be completed in mid-October, as I understand. And the committee will certainly want to review that.

But why is it taking so long for this case to be resolved? Do you have any thought?

Mr. DAHLBERG. Senator, I can't fully answer that, but I do know that there are several reason that I can cite.

First of all, when you start a proceeding there are processes of—there is a process to expedite matters. In the DOL case that was not exercised by the complainant, Mr. Mosbaugh. So there is a proceeding for an expedited resolution. That was not pursued.

Some of the delays, in fact, come from the complainant. In the area of discovery, we had to file several motions to compel him to produce documents during discovery. We had to file those motions. And we have gone through several proceedings.

Mr. Mosbaugh indicated that we went through one proceeding at DOL and then it was appealed. It went to full hearings. We had the administrative law judge. We put up witnesses. It took a long time. And we got a finding. We got a finding in that case favorable to the company that said yes, we had the right to terminate Mr. Mosbaugh.

We still don't have a final decision, but we do have that draft order.

Why it takes that long I can't tell you, but there are many steps in that process.

Senator SIMPSON. Was your access to the NRC or his, as you know it, limited in any way? In other words, was access to any investigative body limited? Were you limited? Was he limited, as far as you know? You can't speak. He can speak better for himself. But were you?

Mr. DAHLBERG. I know of no limitations on anyone's part.

Senator SIMPSON. And you say you provided all information to the NRC that could have ever been provided you your company? Is that what you are saying essentially?

Mr. DAHLBERG. Any information requested was provided, and any cooperation sought was given.

Senator SIMPSON. And then you are saying that Mr. Mosbaugh did not provide all information and material to either you or the NRC on a timely basis?

Mr. DAHLBERG. In the DOL case that is correct, and in the case of the NRC, with respect to the tapes, we have not received the tapes until recently.

In fact, during the course of discussions with the NRC, even several months after he had begun taping, he didn't volunteer to provide those tapes. Even at such time as the NRC asked him about the possibility of wearing a wire, he didn't even tell him at that time she had tapes and they were available and they were not provided.

Senator SIMPSON. Have they been provided now?

Mr. DAHLBERG. Yes, they have.

Senator SIMPSON. And to you they were provided in——

Mr. DAHLBERG. By the Senator's staff a week ago.

Senator SIMPSON. Do you think that the problems of breach of confidentiality have led to where we sit today?

Mr. DAHLBERG. No, sir.

Senator SIMPSON. You think that everything was done properly, or that there were breaches or lacks of confidentiality which gave problems to you?

Mr. DAHLBERG. I don't think so.

Senator SIMPSON. So you felt that you were as open with your documents and presentation of evidence, if you will—poor word used in a chamber like this—but that you were forthcoming?

Mr. DAHLBERG. Yes, sir.

Senator SIMPSON. How many hours of tape recordings were performed here?

Mr. DAHLBERG. I can't tell you precisely, Senator, but there were thousands of conversations. I don't know in minutes, but there were thousands of conversations. They were taped. They weie taped with people anywhere from secretaries to plant managers to the NRC resident inspector.

Senator SIMPSON. Is this case representative of anything that has happened like this to your company before?

Mr. DAHLBERG. Not like this. No, sir.

Senator SIMPSON. You called it—someone called it an aberration.

Mr. DAHLBERG. I called it an aberration.

Senator, let me clarify one thing. I'm not sure it is clear, and I want to make sure we understand it.

When I terminated Mr. Mosbaugh for doing the taping—and I have talked about the free flow of information—it put me in this position: if I hadn't taken some action, it would have, in a sense, said that we tolerate that behavior. So every other employee in that plant would never have know if we tolerated the employee right next to him also wearing a tape recording.

If you created an environment where any employee could wear a tape recorder and that was tolerated and accepted by management and then expect there to be a free flow of information to discuss problems or opportunities for improvement or anything else in the plant, it just seemed to me that it could not possibly exist, and that the violation of trust with all other employees just disappeared and that I didn't have any other opportunity.

Senator SIMPSON. Let me ask you another question which people do understand.

You have been through a lot of stuff here. You have been through a lot of administrative procedures. You have had your arm up and sworn yourself to testify at various hearings. At every step along the way you have won; is that correct?

Mr. DAHLBERG. That's correct. We got a technical violation, but never a willful violation. In the Department of Labor at this point we have won.

Senator SIMPSON. I think that needs to be part of the record. I don't know where it is going from here. Let it go through whatever process it goes through. But to this point, to be the subject of one

who has not done it correctly I think is an inappropriate assessment.

I thank you, Mr. Chairman, very much for your patience and courtesy.

Senator LIEBERMAN. Thank you, Senator Simpson.

I do want to indicate, just for the record—and you are absolutely right that on the retaliation question that's on appeal and you have won up until now. The NRC did issue a fine against the company for a violation based on one of the allegations that Mr. Mosbaugh made.

Mr. DAHLBERG. Yes, sir.

Senator LIEBERMAN. Again, this is not with regard to why you fired him. This is with regard to the safety in the plant, or technical conduct in the plant.

Mr. DAHLBERG. That is correct. It was on the first issue that was raised, and that issue was resolved on September 19, 1991. We did receive a technical violation with the finding, and that was the date of the enforcement conference. They did not find a willful violation.

Senator LIEBERMAN. Maybe I'm confused. My notes indicated that on June 12 of 1992 the NRC imposed a civil penalty of $100,000 on Georgia Power with regard to the dilution valve matter. Is that a separate matter?

Mr. DAHLBERG. I think that is the same one. The enforcement conference was in September, and the fine I think would have been issued subsequent to that.

Senator LIEBERMAN. Right. And in fairness to you, Georgia Power paid the penalty but stated that the violation was not the result of anything the company did wrong but was the result of ambiguous NRC guidance; is that right?

Mr. DAHLBERG. I believe that's correct. Yes, sir.

Senator LIEBERMAN. And this was the result of the investigation of the allegations that Mr. Mosbaugh had brought in 1990?

Mr. DAHLBERG. That's correct.

Senator LIEBERMAN. Just because these are such big operations and they are right out there knowing about it. And also you have expressed some frustration about the time that it takes to resolve these matters, both before the Department of Labor and the NRC; is that fair to say?

Mr. DAHLBERG. That is fair.

Senator LIEBERMAN. And particularly the amount of paperwork that is involved?

Mr. DAHLBERG. Yes, sir.

Senator LIEBERMAN. I have no further questions. I thank you for coming in and testifying.

Mr. DAHLBERG. Thank you and the other members of the subcommittee.

Senator LIEBERMAN. Thank you, Mr. Dahlberg.

We will now go on to the Inspector General of the Nuclear Regulatory Commission, Mr. David Williams.

Mr. Williams, would you please raise your right hand?

[Witness sworn.]

Senator LIEBERMAN. Welcome. I'd appreciate it if you would introduce yourself and the gentleman that is with you and then proceed to summarize the report that is the basis of the hearing today.

TESTIMONY OF HON. DAVID C. WILLIAMS, INSPECTOR GENERAL, NUCLEAR REGULATORY COMMISSION, ACCOMPANIED BY LEO NORTON, ASSISTANT INSPECTOR GENERAL FOR INVESTIGATIONS, NUCLEAR REGULATORY COMMISSION

Mr. WILLIAMS. Thank you, Senator.

I am here with Leo Norton. He is the Assistant Inspector General for Investigations for my organization.

Mr. Chairman and Senator Simpson, I am pleased for this opportunity to appear before you today to discuss our inspection report entitled, "NRC Response to Whistleblower Retaliation Complaints."

Our inspection, conducted at your request, discusses the NRC process for handling allegations of retaliation against whistleblowers who report health and safety issues to their management or to the NRC.

Our inspection was initiated in 1992 based on the receipt of serious complaints from current and former nuclear licensee employees.

The purpose of our inspection was to examine and better understand the nature of the complaints and the magnitude of the problem.

The inspection disclosed substantial dissatisfaction among the allegers, as well as many NRC staff involved with the process. The NRC process of delaying action until the Department of Labor concludes its proceedings contributes to the untimely resolution of whistleblower complaints. This process essentially leaves the whiwtleblower with the feeling of being left out in the cold.

The result is a chilling effect for both whistleblowers and coworkers who may have additional safety concerns to report. These findings suggest the need for substantial additional work by the commission and my office to reconsider and attempt to improve the manner in which we address whistleblower retaliation complaints in the nuclear industry.

The NRC has the responsibility for regulating the operation of 112 licensed nuclear power plants and more than 8,000 materials licensees. The magnitude of the licensed activities is so extensive that the NRC can only inspect a fraction of them. Therefore, the NRC relies on licensee and contractor employees to report safety concerns.

If employees are subjected to retaliation by their employers for reporting safety concerns, there is a potential chilling effect which has serious health and safety implications.

Although the NRC can initiate an investigation at any time during the DOL process, the agencies agreed in a 1982 memorandum of understanding that the NRC would not normally conduct a parallel investigation. NRC regulations and Federal statutes allow enforcement actions against licensees which could include: denying, revoking, or suspending a license; imposing various civil penalties; and initiating criminal investigations.

While the NRC enforcement authority is directed at the licensees, the DOL authority is directed toward restoring the employee's job status when appropriate.

Between October of 1988 and April of 1993 the NRC received a total of 609 retaliation complaints and initiated full-scale investigations for 44 of them. Of these complaints, 369 were also filed with the Department of Labor.

Based on the complaints received, seven NRC enforcement actions were taken against licensees during the period; however, no individuals have been prosecuted criminally.

The two charts on displays before you describe a description of the NRC and the DOL resolution of the retaliation complaints. Based on our interviews, several issues surfaced that were common to the complaints received from the whistleblowers which I would like to describe.

First, I'd like to discuss the perceived lack of timely NRC response to retaliation complaints.

Whistleblower felt that the Government does little to protect them from retaliation or to investigate their allegations of retaliation in a timely manner. They felt abandoned because the NRC waited for the DOL to determine whether the whistleblowers were subjected to retaliation.

A number of NRC staff interviewed by OIG agreed that a lack of aggressive and timely NRC response to the complaints of retaliation can send a message to whistleblowers that retaliation complaints are not a priority matter.

Further, the licensees received the message that acts of retaliation will not be met with firm and rapid response from the NRC. This lack of timely action results in a chilling effect for whistleblowers and their co-workers.

Next, let me turn to the questionable impact of NRC's chilling effect letter.

When the Department of Labor finds for an alleger in a retaliation case, the NRC sends the licensee a chilling effect letter. The licensee must respond to this letter and explain its program to ensure that retaliatory acts have not had a chilling effect on other employees.

Several NRC staff felt that the letter was ineffective and had no deterrent effect for licensees. Also, the staff told us that NRC did not routinely verify representations and licensee responses to the chilling effect letters.

The next matter I'd like to discuss involves the whistleblower's belief that their identities were being compromised when they followed the very procedures that NRC has in place to protect their identities. The NRC encourages licensee employers to first attempt to resolve their technical concerns with the licensee management. If this attempt is unsuccessful, the employee is encouraged to report the concern to the NRC.

If the employee follows this path, the employee is identified by management as being concerned about particular safety issues. Should the employee report the technical issues to the NRC and the NRC inspects these same issues, the employee could easily be identified.

Disclosure of the alleger's identity through this process is known as fingerprinting.

The individuals we interviewed offered suggestions for changing the agency policy for responding to whistleblower complaints. One idea offered was for the NRC to vigorously use the wrongdoer rule. This regulation allows the NRC to order that a person be removed from licensed activities. Substantial criticism was directed at the NRC practice of penalizing only the corporate entity for retaliation.

Allegers maintain that individual managers responsible for willful acts of retaliation were not penalized and often continued working in the nuclear industry.

Attorneys representing both allegers and industry licensees concurred that the use of the wrongdoer rule is a potentially effective means of assigning responsibility to individuals found guilty of willful misconduct.

Another suggestion focused on protection for actively employed allegers during the NRC investigations. Many of those interviewed believed that the NRC could order licensees to temporarily protect an alleger's employment status until the NRC completed its investigation.

This practice could be abused by employees wishing to avoid adverse personnel actions or a scheduled lay-off. However, the option could be considered when these motives can be ruled out.

On another matter, there was an overall belief among those individuals interviewed by my staff that the current level of monetary penalties has little deterrence for licensees. Therefore, they suggested increased civil penalties and stronger enforcement actions. Although substantially larger monetary fines are an alternative, some of those we interviewed even questioned the impact that the larger penalties and negative publicity would have.

Nearly all agreed, however, that the NRC ordering a shutdown of a nuclear powerplant would be the most significant non-criminal penalty to impose on licensees. Many of the interviewees maintained, however, that these were the only penalties that would cause licensees to consider retaliation to be a serious matter.

Lastly, there was a substantial call for the NRC to assume full investigative responsibility for retaliation complaints. Many of the individuals interviewed believed that if the NRC assumed full responsibility for investigating and adjudicating retaliatory complaints there would be a positive impact in reducing the chilling effect.

They believe that the timely investigations and enforcement actions by the NRC will provide licensees with the strong message that retaliation will not be tolerated.

Also, licensee employees will know that the NRC can provide protection to those employees who cooperate with the NRC.

In conclusion, we found that the NRC process for handling allegations for retaliation does not provide an adequate level of protection for whistleblowers. Our inspection disclosed substantial dissatisfaction with the process among the allegers and the numerous NRC staff that we interviewed.

The NRC staff acknowledged that the current practice of awaiting DOL decisions does not provide for timely resolution of allegations, and the associated delay can send a message that retaliation

complaints are not a priority concern. This perception can result in a chilling effect for whisteblowers and their co-workers who may have additional safety concerns to report to licensing management or to the NRC.

Mr. Chairman, let me thank you and the subcommittee for your focus on this problem. I will be happy to answer any questions regarding our work that you may have.

Senator LIEBERMAN. Mr. Williams, thank you.

Again, though we may disagree on different parts of what we have heard, I think we have seen enough in the history of whistleblowing to know it is important in this area that the NRC needs this climate of cooperation from employees.

Your report suggests that the system is not working well now in regard to the timeliness of the response, but also in regard to your conclusion that there is not now an adequate level of protection for those who, in fact, blow the whistle.

I am impressed that these conclusions are based not just on your communication or interviewing of whistleblowers, but also on your interviewing of the NRC staff.

In my opening statement I expressed some concern about the difference in the numbers here, and I am going to obviously give the NRC an opportunity to respond, too, but, just looking at them, there is a question that you've got such a small percentage of these complaints. And these, again, are complaints of retaliation, meaning something done against the whistleblower by the company. An employee says, "I blew the whistle and the company came down on me."

In the case of the NRC, in the chart you show 609 filed, NRC investigates 44, with only 7 enforcement actions. The Department of Labor—a smaller universe of complaints, for reasons that you may want to explain—369, but of those they find for the alleger, the whistleblower, in 58 cases, and 41 are settled.

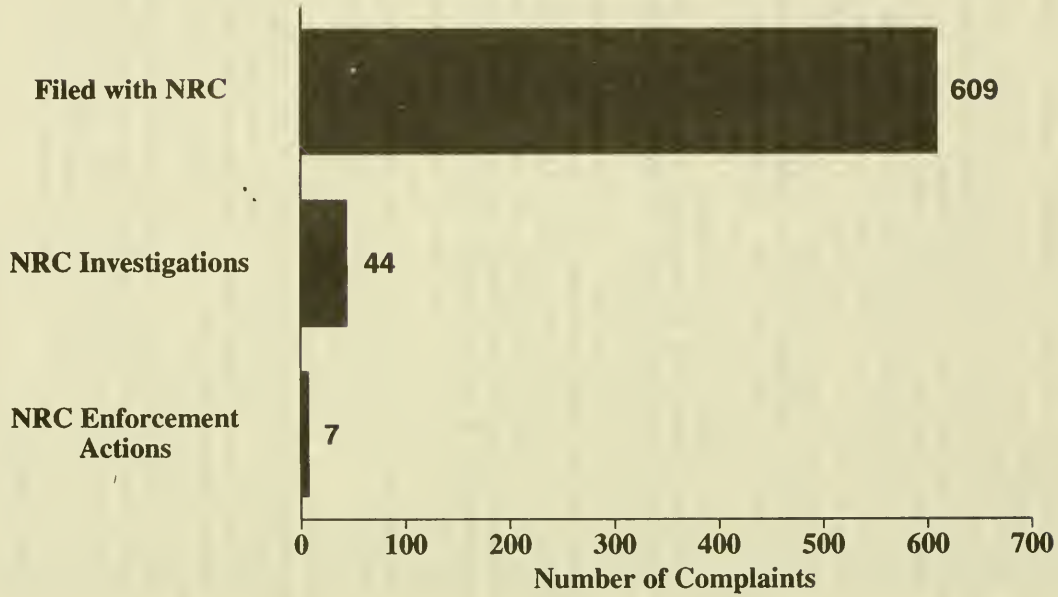
I know from a legal point of view you shouldn't draw any conclusion from that. I think there is a general feeling that when a case is settled there is at least some substance to it. And I say that indirectly or informally.

But even putting those together you've got almost 100 out of 369 that it looks like the DOL—for all our complaints about their lack of speed, which we will come back to in a minute—were substantive and very much fewer by the NRC. What is the difference there? Is that reason for us to be concerned about what is happening at the NRC?

[The charts referred to follow:]

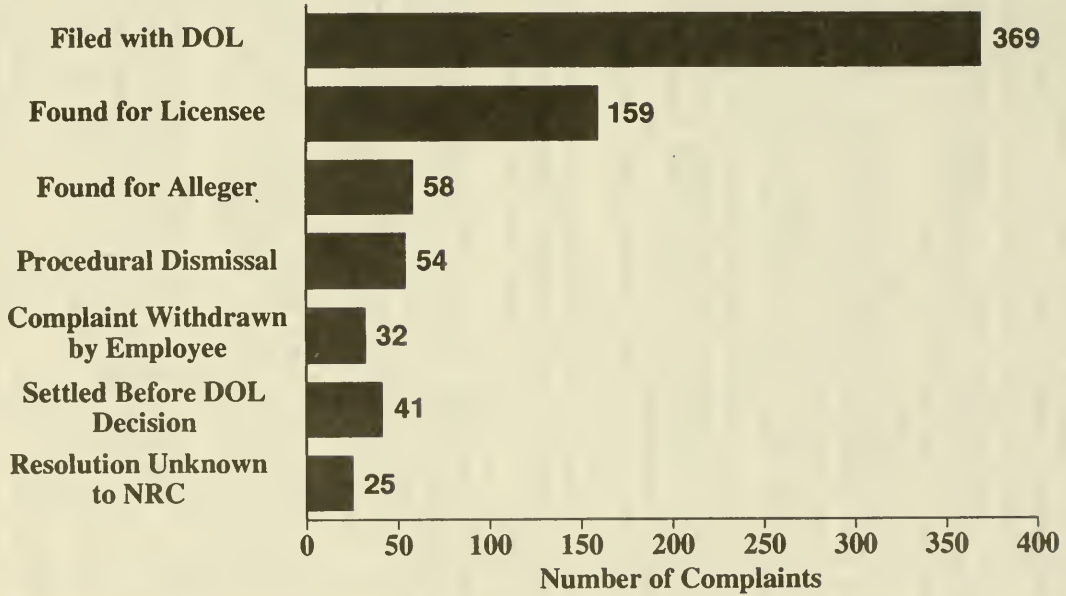
Complaints of Retaliation, NRC Investigations and Enforcement Actions

October 1988 - April 1993



DOL Processing of Complaints Received from NRC Licensee Employees

October 1988 - April 1993



Mr. WILLIAMS. In a letter that I wrote to the Commission I indicated that I wanted to examine the issue that you just brought up. I think that is a key issue.

We are concerned with what those charts show us, as well. We know that the Department of Labor investigates all of the complaints, and in about one-fourth of the complaints, as you can seen, they have sided with the alleger.

Senator LIEBERMAN. Right.

Mr. WILLIAMS. The NRC investigates far fewer. We investigate one out of every fifteen complaints. We have found for the alleger in an enforcement action in 1 out of every 100 instances, roughly.

That concerns us. We discovered during the course of our investigation that the agency is not very well served by its information systems. As a result of that, most of the work that we had to do and that the programs had to do were retrieved by hand.

Senator LIBERMAN. You don't have good records of the whistleblower complaints?

Mr. WILLIAMS. That's correct, sir. It doesn't allow for trending studies or for easy retrieval.

As a result of that, we need to break off this puzzling phenomenon and study it subsequently. We intend to do that, and have pledged to the Commission—and we pledge to you, as well—that we will do so quickly.

The Commission has the very same concerns that you have. In discussing it with them, it occurred to all of us that these required further study.

Senator LIEBERMAN. So it is a question that can't be answered now, but it is a question that you and the Commission are going to pursue?

Mr. WILLIAMS. That's right, Senator.

Senator LIEBERMAN. Just for the record, explain why there is such a larger number of complaints with the NRC than with the Department of Labor.

Mr. WILLIAMS. I'd like to ask Mr. Norton, who was closer to the work, to join with me. I know that there are constraints or reporting to the Department of Labor that are not the case with NRC, and perhaps Leo can elaborate on that.

Mr. NORTON. Yes. There are some 240 complaints that were filed solely with the NRC.

Sometimes, as Dave points out, up until last year there was a 30-day window in which whistleblower could make his complaint.

Senator LIEBERMAN. To the Department of Labor?

Mr. NORTON. To the Department of Labor.

That was not so with the NRC. The NRC would still look at that complaint.

There were also several matters that might not rise to the level of a DOL complaint but the NRC would still look at it. The adversity of the job action may not be sufficient to pursue through DOL.

It was reasons like that, Mr. Chairman.

Senator LIEBERMAN. And the 30-day limit has now been altered to what?

Mr. NORTON. To six months.

Senator LIEBERMAN. So it is quite possible in some of those cases that somebody didn't really get it together in time to file a complaint for personal damages or seeking their job back, for instance?

Mr. NORTON. Yes, sir. That's very true. We know of several instances like that.

Mr. WILLIAMS. Actions of retaliation can be subtle, and although you can suspect it, it is a time before you arrive at certainty.

Senator LIEBERMAN. Right.

Mr. WILLIAMS. We were pleased to see that the period of time was extended, and I know that the committee was part of that action.

Senator LIEBERMAN. We have talked a lot about the Department of Labor here, and I agree with Senator Simpson. We will hold a special session with them.

As you know, coincidentally not in response to a request from us, the Inspector General at the Department of Labor, just because he has had a lot of allegations, himself, did an investigation and did find that a number of the cases were old, one of which was actually waiting for a final decision, Senator Simpson, for more than 10 years.

The IG at the Department of Labor felt that the situation was so bad that it substituted what he called a denial of due process in many cases—not in all cases, obviously. That's a troublesome finding.

In your own work here on this general matter, do you reach any conclusions about whether we should be attempting to consolidate the roads down which we ask whistleblowers to go if they feel they have been retaliated against? In other words, should we fold the Department of Labor process into the NRC or, I suppose, vice versa?

Mr. WILLIAMS. A number of people that we interviewed told us that they strongly felt that would be a good idea. I haven't arrived at a conclusion, and I have suspended judgement on it purposefully. The Commission has assembled a powerful group of people to examine this issue.

Two investigations are never a good idea. My background is that of an investigator, and nothing is more troubling to me than to have to go in and re-investigate a matter that has been——

Senator LIEBERMAN. In other words, the two being the Department of Labor and the NRC?

Mr. WILLIAMS. Yes. So, if nothing else, they could interfere with one another.

Senator LIEBERMAN. Right.

Mr. WILLIAMS. In my own mind, I would hope that the Commission's group also looks, however, at ideas for tightening up and improving the system that is currently in place.

I mentioned that information systems that would allow trending would be helpful. I think we ought to routinely look at the Department of Labor's 30-day investigation. I think that will tell us a lot of information.

We also can freely contact the investigator. That's useful.

Where it is appropriate, we could start after the 30 days. There isn't anything that bars that, and that could provide much more immediate relief to the whistleblowers. In the cases where the util-

ity or the licensee is innocent, I'm sure they would welcome that, as well.

Senator LIEBERMAN. Better than waiting until the conclusion of the Department of Labor handling of the complaint.

Mr. WILLIAMS. Yes, sir.

Senator LIEBERMAN. I have gone well beyond my time on this round.

Senator Simpson.

Senator SIMPSON. Thank you, Mr. Chairman.

Thank you, Inspector General Williams.

So, when a complaint is filed from the employees, I would bet that everybody knows who did that, regardless of what the statute says.

So they know who did it, and I think probably things change for that person in the work place. I'm talking about real life.

"You're the guy that did that? What happened to you?"

"Well, nothing yet."

"What is going to happen to you?"

"I don't know. Something."

That's probably the way that works in real life.

Then, at that point, I would suppose that many things might take the essence of retaliation. I believe you used the word "subtle," but I think it would be there. I think that's something we will have to weigh at some point, but I think that's very real.

The exposed employee is going to be exposed to "subtle" retaliation, as you so aptly stated it.

Let me ask you just a couple of questions.

Your report reaches some broad conclusions about the NRC process, but I want to ask about the amount of data you used to get here. I seems to me that it was rather sparse.

You relied on interviews with 16 allegers. There are apparently 609 realization complaints. Is it your conclusion that a sample of 16 complainants is a fair representation of the views of obviously hundreds to complainants?

Mr. WILLIAMS. The scope of our work was to try to get an understanding of what these complaints were about. We were receiving a volume of them, as was your subcommittee. Our work was to try to get an understanding of them.

Beyond that, we did attempt to try to understand the magnitude of the issue. We could not have given you a timely report had we done a thorough job of examining 609 complaints. It would have come to you in such an untimely fashion that the horror stores you heard would have been eclipsed by the length of time it took us to bring the story to you.

We did do other things, though. In addition to looking at the 16 and trying to get an understanding, we talked to the NRC employees cross the country in all five of the regions at the headquarters level to try to get a sense of how they felt things were going. They told us in most instances that they didn't have a good feeling about the way things were going.

We looked at the policies and the procedures. We also looked at the folders surrounding a sampling of investigations. We also interviewed attorneys that represented whistleblowers and the utilities

in large groups. That gave us a broader kind of understanding and scope.

The employees that we talked to were very important for us. They work with this every day. They see the entire volume. Together they have processed all 609. They were quite dissatisfied with the system and expressed that to us. They tried to identify problems. They suggested somethings sweeping solutions and cures to it.

They also empathized with the hazards of being a whistleblower. As we looked to those policies and procedures, we brought our own common sense and real-world background into it and asked ourselves if we would want to be a part of this process.

Those helped us to expand our work to the conclusion that we did.

Senator SIMPSON. I think I'm just wondering how you chose the sample, and I want the record to show that I joined with our chairman to request this report. We didn't give you a lot of time, but I am not going to let him float out there. I signed that thing, too.

I'm trying to determine whether, in all the cases you examined, how many did you established that the NRC or the licensee determined that the complainant had raised a significant safety issue? That's what it is about, not whether he or she were just didn't like their work.

Mr. WILLIAMS. Mr. Norton would like to answer that, and I'll join him.

Senator SIMPSON. Good.

Mr. NORTON. Senator, of the 16 people that we interviewed, 15 of them raised original technically-valid concerns with the NRC. the 16th person raised a concern that was valid, but it was already in possession of the NRC. So of the 16 people we interviewed, 15 of them raised concerns that the NRC was not aware of.

Senator SIMPSON. But that was about the public health and safety?

Mr. NORTON. They were technically-valid concerns. The significance of the concerns did vary, but they ranged from such matters as welding concerns; emergency lighting concerns; fire protection concerns; Rosemount transmitters, of which we have heard about; emergency generators, which we have heard about; cabling defects; and thermo-lag.

Senator SIMPSON. But they were all, for the record, about health and safety?

Mr. NORTON. Yes, sir. The only reasons for my slowdown is one of them was much more about potential problems within the NRC, itself.

Senator SIMPSON. Along those lines, your report is based on a discussion with 26 NRC staff professionals. With few exceptions, as I look at it, none appear to be senior officials of the agency. Did you interview Mr. Taylor or Mr. Merley or any of the regional administrators? If not, why not?

Mr. WILLIAMS. We interviewed the heads of the programs that were operating and supervising each aspect of the process where the process comes in, and we looked at that before and felt that was going fairly well.

The process that was investigated—we talked to the head of that program. And, with regard to the decisions made on enforcement actions, we talked to the head of that program.

We interviewed the people that we felt were in possession of the greatest knowledge at the highest level.

Senator SIMPSON. But not at the level I just spoke of?

Mr. WILLIAMS. My recollection is that we did not interview the executive director or——

Senator SIMPSON. So you weren't really at the highest levels; you were just at various levels?

Mr. WILLIAMS. We were at the highest program levels that supervise this problem. When it becomes more generalized management, we did not conduct interviews there.

Senator SIMPSON. With any of the regional administrators?

Mr. WILLIAMS. That's correct. At the region, as well, we interviewed the people that received and handled the complaints.

Senator SIMPSON. When you say you interviewed high-level or senior officials, we reflect that it really isn't quite described as such.

Mr. WILLIAMS. Well, it wasn't the top official, and it wasn't the Commissioners. Just below that is the level that we operated at.

Senator SIMPSON. But not regional administrators and not senior officials?

Mr. WILLIAMS. I would agree with you that, as we have said, we didn't talk to the regional administrator. I consider those other people to be high-level officials.

Senator SIMPSON. But you say in your report that you make statements about "the NRC staff had varying opinions." And, "NRC staff acknowledged that the current NRC practice of awaiting DOL decisions does not provide for timely resolution of allegations." I just think that needs clarification. I'm not saying it is the wrong thing to do. I think the public is reading it and they need to know who these people are.

Mr. NORTON. Senator, may I correct something?

Senator SIMPSON. Yes, sir.

Mr. NORTON. Jack Taylor, who did a considerable amount of work on this, corrected me. We did interview one regional administrator.

Senator SIMPSON. Who was that?

Mr. NORTON. Region four. That would be our Arlington, Texas, office.

Senator SIMPSON. His name?

Mr. NORTON. That would be Mr. Milhoan.

Senator SIMPSON. So he was interviewed?

Mr. NORTON. Yes, sir.

Senator SIMPSON. In depth?

Mr. WILLIAMS. I apologize, Senator. I was——

Senator SIMPSON. That's all right. In depth? You spent some time with him, or some officer of your agency?

Mr. WILLIAMS. That is Jack Taylor, sir. He conducted some of the work.

Senator TAYLOR. I did not personally interview this gentleman, but he was interviewed by some of our investigators, sir.

Senator SIMPSON. For how long a time?

Mr. TAYLOR. I couldn't give you that.

Mr. WILLIAMS. I'd be happy to provide that information.

Senator SIMPSON. Fine. I don't want to delay.

I've already ruined the chairman's lunch—in many ways.

Senator LIEBERMAN. You haven't ruined it, and I'm not going to lose it.

Senator SIMPSON. Anyway, let me leave you now, Mr. Chairman, and pledge to work with you, as I have in the past and will in the future, and with your staff, and join in smoothing this process, making it work.

Legislating, if done correctly, is very dry work. That's what this arena needs—dry, steady work. I have been in it, as I said, for 14 years. I had hair when I started and weighted 260. Now look at me. Emaciated wreck of a man.

But I have a remarkable respect for Joe Lieberman, and I would not have been here this morning, because I trust him so, except for the playing of the tapes. I want the record to show that's the only reason that I was stimulated to say what I said, because he does these hearings with great fairness and great skill, and he is a very remarkable man.

So, with that, I think I shall conclude.

Senator LIEBERMAN. Thank you, Senator. I thank you for your kind words and your confidence, and I return them.

I look forward to working with you to make this process better, which I think all of us agree is so important to public safety, and which you, as an independent Inspector General, have said to us quite clearly in your report is not functioning as we want it to function. That's our loss. It is NRC's loss. We want to see if we can work together to make it better.

I have one final question about the chilling effect letter. This one has struck me. I know you expressed some concerns about it.

This is the case where the Department of Labor area director finds in favor of a whistleblower, and then the NRC, at that point, sends a letter to the whistleblower's employer, I gather raising the question of whether their administration is having a chilling effect on the willingness of potential whistleblowers to come forward and complain about safety violations.

Why don't you talk about that a little bit? I gather your concern is that not much is happening that is meaningful in response to those letters, that more has to be done.

Mr. WILLIAMS. The work that we did and the interviews that we conducted suggested that the chilling effect letter has some impact where a single violation has occurred, and it is not impossible that it doesn't have an impact where licensees are conscientious.

We are concerned, and I think it is rather broadly believed, that when recalcitrant repeater licensees continue to commit the violations and then receive the request for this assurance that it is reduced to a kind of boilerplate and a facade. And they make representations to us that we don't bother to check on very well. That's a concern for us.

We believe that when—we have a pretty good idea of who the people are that have become hardened by this process and unaffected by it.

We believe that if we sent people to the site they might be able to poke holes in this boilerplate language. They could check the representations.

We know that those aren't always true. And they could send a very strong message both to the management and to the people that are observing this process and the people that we hope continue to bring us safety information that we care very much about the environment down there and we will be there quickly and firmly when we think that environment is in jeopardy.

Senator LIEBERMAN. That's an important statement, and an important part of the process, and it certainly responds to both what Mr. Blanch and Mr. Mosbaugh said earlier and, in fact, what your report says that you heard from others, which is that once a whistleblower is retaliated against, or there is a feeling that he or she has been retaliated against, then it clearly does have a probability of having a chilling effect on the willingness of others to come forward.

Mr. Blanch's testimony of what he said to the worker who called him recently about what to do about a problem is seen as strong evidence of that. So I think that is part of the process that I'd like to hear from the NRC on, and it sounds to me like part of the process that we ought to try to improve.

Do you have anything else you would like to add?

Mr. WILLIAMS. No. I think our full statement and full report I think has some additional details, but those represent our work fairly.

Senator LIEBERMAN. I appreciate your report. Obviously, Inspectors General play an important role. In this case, where there is a lot of emotions and a lot of cross-currents, I think the fact that you have come in and, in a sense, independently and dispassionately reached these conclusions in a calm way just deepens my feelings that we've got to improve this system. Something is wrong here.

Thank you very much.

Mr. WILLIAMS. Thank you, Senator.

Senator LIEBERMAN. I will now call on the Commissioners: Ivan Selin, the chairman; Kenneth Rogers; and Forrest Remick.

Gentlemen, we ask you to remain standing and please raise your right hands.

[Witnesses sworn.]

Senator LIEBERMAN. Thank you very much. Please be seated.

I appreciate your patience. It has been a long hearing. Regardless to Senator Simpson's reference to my lunch plans, I am here to stay. I want you to feel that you have an opportunity to speak and testify without being rushed.

Chairman Selin, we look forward to hearing you now.

TESTIMONY OF HON. IVAN SELIN, CHAIRMAN, NUCLEAR REGULATORY COMMISSION

Mr. SELIN. Many of us can do without the lunch with no cost.

By the way, I would like to mention for the record I think we have a very passionate Inspector General. More seriously, he does go after this with a lot of emphasis.

I would not agree with the statement that just based on his findings there are problems in the program, but there are problems in the program so that's a rather—I don't want to call it pedantic, but the Commission doesn't really question the overall strength.

But I would like in the oral testimony to try to provide some depth and some detail for this discussion. It has been a very interesting discussion but, in a sense, a rather superficial one.

In particular, I agree with your opening remarks about the importance of allegers. I don't want to call them whistleblowers. We are talking about a broad source of information. But I think that the issue is far broader than our enforcement process and whether our enforcement process works. I think it is how to assure the free flow of allegations.

We will address all the questions we have asked on the enforcement process, but just to concentrate on the enforcement process is like saying we have a drug problem so we have to put more money into law enforcement. We have to look at prevention, as well.

In my statement, and I hope in our discussion, we will embed the questions that have come up so far in a broader set of issues.

Most of the employees—and I will try to answer some of the questions that have come up earlier. I'm sure I will run over the seven minutes, but I think it will be time efficiently spent here.

Senator LIEBERMAN. Go right ahead.

Mr. SELIN. With your tolerance, Mr. Chairman.

Most of the employees who submit allegations to the NRC or raise issues to licensees do so without retaliation, but there are far too many cases where retaliation has occurred, and this simply is not acceptable to the Commission.

Our focus has been on preventing discrimination from occurring in the first place and, of course, where it does occur, on taking action to remove any related potential chilling effect.

In other words, we are not satisfied for us to think we have a good process. The potential allegers themselves must believe that they will be free of intimidation and harassment so that they will not be deterred from coming forward with their safety concerns.

Before discussing our regulatory program and actions that we take to address discrimination, it may be helpful to briefly discuss the regulatory framework for the protection of allegers.

It has got to be clearly understood that the Atomic Energy Act provides the Commission with authority to investigate cases of potential discrimination for raising safety issues, and to take appropriate enforcement action against licensees, but the Commission has no authority to provide an individual remedy such as reinstatement or back pay for an employee who has been subjected to discrimination.

The enactment of section 210, now renumbered section 211, of the Energy Reorganization Act in 1978 established a process to provide such a remedy through the Department of Labor.

In view of DOL's complementary responsibilities, the DOL and the NRC entered into a memorandum of understanding in 1982. Apparently, of the safety agencies whose statutes provide for the DOL to provide remedies for individuals who have been subject to

discrimination, the NRC is the only agency that has negotiated an MOU with the DOL.

Unlike the NRC, most of the other agencies we have contacted do not take any enforcement action against their regulated entities for discrimination. They are generally satisfied with whatever the DOL happens to order as a remedy for the individual.

I wish to stress this point. We can improve, but our process already goes a lot further than the process of any other safety agency in the Federal Government. Of course, we consider our responsibilities to be much more severe, and we think that's appropriate.

As has come up earlier, when the NRC receives a safety allegation the staff reviews it for technical safety significance, and that's 100 percent review of the content of the allegation as opposed to the implication that there is a hostile environment for good management.

The technical safety allegations are often referred to licensees for resolution because it is the licensees who have the primary responsibility for the safe operation of their facilities. We'll make these referrals to licensees only if we are confident that the precautions taken will protect the alleger from being identified if the alleger wants to maintain confidentiality.

Quite frankly, four or five years ago that process didn't work very well, but we have done a much better job recently. At least I am satisfied we have done a much better job recently at protecting confidentiality.

Where an alleger suggests that discrimination may have already occurred, we emphasize to the individuals that if they want a personal remedy for the discrimination they must contact the Department of Labor promptly. It is not that we force them to go to the Department of Labor, but we make it clear we are not in a position to give them this remedy.

Having said that, in practice it is true. I have done a survey myself, and it is true that in practice we have not made this fine point so much. We have pushed people to go directly to the Department of Labor.

Nevertheless, I would like to call your attention to chart one. I think it is important to lay out the process clearly, since there has been a lot of rather approximate discussion of what the process is.

The first point is that we get—in the four-and-a-half years that were covered by the IG's report, we have gotten about 3,900 technical complaints—not H&I, not organizational complaints, but technical allegations that come to the NRC.

Senator LIEBERMAN. Why don't you define H&I for us, sir?

Mr. SELIN. H&I is a harassment and intimidation complaint.

Senator LIEBERMAN. Right.

Mr. SELIN. I would like to rather arbitrarily distinguish between technical safety questions and organizational safety questions. I don't apply one as more important than the other, but the technical questions have to do with operations, training, valves, design. The organization has to do with everything from the integrity of the licensee down to whether allegations are treated fairly or not.

Senator LIEBERMAN. That's a good point.

Also, by the way of definition and semantics, the word "technical" violation is sometimes used to suggest that it is an inconsequential violation, which is not the case.

Mr. SELIN. I didn't——

Senator LIEBERMAN. No. I know you haven't done it. I was thinking about it earlier in the conversation. Technical really goes to the technical make-up of the facility.

Mr. SELIN. Yes, sir. The Vogtle violation was a very serious violation that was referred to.

There is a strong feeling—which, quite frankly, I share—that the staff is, in fact, more conditioned to look at the technical concerns as being somewhat more immediate than the organizational concerns, and one of the functions that your hearing and the preparation has called forward is the intention of the Commission that this not continue to be the case.

But, looking at the numbers, we have gotten about 3,900 allegations of technical situations in the last four and a half years.

Senator LIEBERMAN. Excuse me for interrupting, but just relate that the 609 number that was up before.

Mr. SELIN. Okay. I will get to that in a second, sir, if I might.

Senator LIEBERMAN. Good.

Mr. SELIN. Of those, either an employee went directly to the employer and was not satisfied or came to the NRC. Of those 3,900, because every H&I allegation has within it some kind of a technical allegation, as well, the employee says, "I found a broken valve. I went to my boss. My boss discriminated against me." So we have 609 of those 3,900 which include a harassment and intimidation component.

Senator LIEBERMAN. Okay.

Mr. SELIN. I think it is very important to point out that of those 610—we like to round off when we do charts in case we missed one here and there—of those 610, 520 of those H&I concerns came to us only after the employee felt that he or she was discriminated against. In other words, the employee first went to the employer, did not receive satisfaction, suffered perceived intimidation or harassment, and then came to us.

Only 90 of those H&I complaints—about 15 percent—happened when an employee went to NRC first, the company heard about it, the employee believes that the company then acted against them.

So it is very important that whatever steps we take make it possible to protect the employees before they come to NRC. In other words, to encourage the companies to listen to these safety allegations and act on them and not discriminate against the employers.

By the time they come to us they have already been discriminated against and, as you know, it is much tougher to remedy a situation than to prevent it in the first place.

If there appears to be an issue of discrimination and the individual has not filed a complaint with the Department of Labor—in other words, in 28 percent of those 610 cases the employee did not file a complaint with the Department of Labor.

In every one of those cases we did a quick look at the complaint to see if there was something we should follow up on. Later on I can give you some numbers as to how those turn out.

But the theory that everybody goes to the Department of Labor is just not right. More than one-quarter of the people did not go the Department of Labor, and in those cases we look at the complaint and decide whether to do an evaluation or not.

Senator LIEBERMAN. Do you agree with what Mr. Williams said earlier? Although we were inconclusive about it, it could be that a lot of those have to be with the previous 30-day limit?

Mr. SELIN. That actually worked the other way. Because of the 30-day limit, people want to go right to the Department of Labor. Now that there is a six-month limit we are sort of nervous that people will hold off on going to the Department of Labor until the end of the six months, and we'll start an investigation, and than it will go to DOL and the coordination will fall apart.

About 12 percent of those 610 complaints just got nowhere. They were not pursued either because the alleger walked away from them—and it might have been the alleger had good reason to walk away, but they weren't followed up. And 60 percent went to the Department of Labor.

So the point I want to make is: of the 28 percent that came directly to us, we have decent procedures. We have an internal formal allegation panel that supervises the Office of Investigations. The panel meets on each one of those complaints. The technical part is investigated, and OI determines, based on the panel finding, whether an investigation is warranted.

The point I am going to make throughout my testimony is that we have very good procedures and the results are not satisfactory, and therefore just concentrating on the procedures is not going to get the answer that we are all looking for.

If the individual has filed a Department of Labor complaint then we monitor the Department of Labor process, and then I switch to the second chart.

There is an area office that makes a decision within three months, and they are pretty good. They really are quite quick. They only have 5 pending cases out of 360 or so that have gone to them.

If they find against the alleger on the merits we drop it and don't look into it. However, if they either find for the alleger or there is some kind of a resolution that is not appealed, a settlement, or they dismiss on procedure—in other words, they haven't ruled on the merits—we will look at every one of those cases.

When I find out if we really look at every one of the cases the answer is no, but our procedures are we should look at every one of those cases and we do look at the vast majority of them. But it is a quick look to see if we should follow up.

So we are dependent so the DOL for its fact-finding if they are doing this thing, but we do take independent action.

It is highly likely that unless there is a settlement—as you can see, 71 are thrown out. The alleger does not appeal for one reason or another.

The change that we made two years ago—we decided to start our actions based on the administrative law judge's finding and not wait for the Secretary of Labor's decision.

Every case that comes out of the administrative law judge is automatically reviewed by the Secretary of Labor.

The dotted lines indicate that without waiting for the Secretary of Labor we wait for what comes out of the administrative law judge's decision process.

Of this large number that came in, 70 of them were settled or withdrawn—mostly settled—so we look at those. Five of them had a finding of discrimination, so we looked at those.

The places where the administrative law judge found for the licensee and not the employee we don't look at at that point.

And then the Secretary of Labor goes. These are cumulative times, so, on average, the Secretary of Labor acts within 14 months. That's not terrific.

Senator LIEBERMAN. Explain to me, because that looks——

Mr. SELIN. Three months. Eleven more months to the administrative——

Senator LIEBERMAN. I see what you are saying.

Mr. SELIN. It is 14 more months for the Secretary of Labor. The problem is not the averages. There are, as the Labor IG pointed out, really——

Senator LIEBERMAN. Some cases have just been sitting there for a long time. Overall, that seems to be where the largest gridlock is now.

Mr. SELIN. I would like to point something out. You have read GAO reports and IG reports. The stuff that criticizes us is pretty modest compared to the Labor Department Report. We are doing pretty well in the process. We are still not getting good results—or at least as good as they might be.

Again, if the Secretary of Labor reaffirms no discrimination on the merits we drop it. With any other outcome—or the alleger withdraws, although they don't withdraw many at that point. If there is a settlement or a finding for the alleger or a dismissal on procedure, sometimes the Secretary of Labor goes back and says, "No, the statute of limitations was exceeded four years ago," we follow up on these points.

Now, the key points that I want to make—some of these have been made. One is that the NRC does not normally initiate an investigation if the DOL was conducting an investigation or had completed an investigation and found no violations.

In some cases we have lost the opportunity to take civil penalty actions because by the time the Secretary of Labor finished five years were up and our statute of limitation was gone.

So in 1992, as I suggested, we started activity at the administrative law judge level, not waiting for the Secretary of Labor. This should be an improvement in the timeliness and effectiveness because the Secretary of Labor is taking an average of 14 months to take these activities.

We are considering going further to make more frequent use of concurrent NRC investigations because of the time it takes for the DOL process which may, even after a wait of several years, end without a decision on the merits.

As I suggested earlier, it is not the NRC as the regulator, but the licensee that has the first responsibility for safety.

Consequently, the Commission in several cases has looked beyond the treatment of individual cases of discrimination and more broadly at the licensee's behavior, even if no one single case was

egregious enough to look at enforcement actions, to take a look at the pattern.

My written testimony lays out half a dozen cases. I'll just site the significant civil penalty action just taken against Northeast Utilities.

In my opinion, this action is really a landmark of strong enforcement, as opposed to the pat on the wrist that previous witnesses may have described. It only took three and a half years which, considering everything that has to be proved for such a strong action, is not so terribly long, given the cumbersome process.

It didn't just go after first-line supervisors, but it made it clear to the licensees they were holding their senior executives, by name, responsible for establishing a work environment that rewards the raising of safety concerns and, in fact, we will not tolerate an environment that is hostile to the employees raising safety concerns.

In summary, we have done quite a bit over the years to establish avenues whereby allegers can come forward with confidence, but the question remains: should we do more? In our opinion we have a good program, but it can and it should be improved.

The process for resolving allegations is clearly not as timely as it ought to be. You have heard many witnesses say that. And the primary reason is the DOL process and its interaction with the NRC.

I think, of course, the DOL process could probably also be improved, but it is the two processes side-by-side that is the problem.

We have taken some steps to speed up the process, and we are going to look at additional steps, as well.

Senator LIEBERMAN. What else are you looking at?

Mr. SELIN. We have this group that is set up. To jump to the end of my statement, the first thing that they are going to do is to see whether we have taken sufficient action to assure that our licensees encourage their employees and contractors to raise safety concerns without fear of reprisal.

Second, where discrimination may have occurred they are going to look to see whether NRC can speed up the resolution of the issues around the DOL process, whether we take sufficient follow-up action to remove the potential chilling effects arising from the discrimination, and whether the NRC can and should use orders and demands for information more vigorously where individuals are found to have caused discrimination.

But the point I want to make——

Senator LIEBERMAN. Those are the right questions, based on what we have heard today.

Mr. SELIN. Yes, sir.

But there is a third thing that we are going to do that we haven't really discussed, and that is we are going to take a look beyond just the enforcement process and see if we should be doing something in the rule-making and inspection steps to make either mandatory or more important that it be looked at that licensees have an employee concerns program, and that the employee concerns program be subject to inspection, at least if there is reason to believe that it is not working well.

Otherwise, we are just going to end up with a process——

Senator LIEBERMAN. Describe that a little better, because——

Mr. SELIN. That is a program within the licensee's situation such that the employees can go out of the chain of command, can go to some trusted ombudsman—and we believe that every licensee at least has one person who can be trusted—that's a joke.

Senator LIEBERMAN. Pardon?

Mr. SELIN. I'm making a joke, if the record will note. Thank you.

Senator LIEBERMAN. The transcriber will note——

Mr. SELIN. The uproarious laughter at this point.

But the confidentiality will be protected, and independent follow-up will happen. In most cases at least the record—this is conjectural. We don't know whether—we don't require such a program. We have 71 different licensees for the 108 operating plants. Fifty of them have such programs.

They all have a quality control program which calls for reporting safety considerations up through the chain of command or to the quality control inspector. We are talking about, in addition to that, to have an out-of-channels program that really emphasizes confidentiality and independence.

One of the things that the staff is thinking about is whether we should have a rule that requires such a program, which then would allow us to inspect such programs, and then to go directly to licensees that we feel or felt were not providing the proper atmosphere.

Now our authority is clear, but it is somewhat indirect. It is more part of the general authority to require that people do what they ought to do and tell the truth and operate safe plants.

Senator LIEBERMAN. That sounds like a good idea. I'm glad you are exploring it.

Mr. SELIN. For the 50 folks who are already running programs, we may end up being too prescriptive for people who already have good programs. So there is always the trade-off between what you do that doesn't adversely affect people who are doing things right in order to catch those who are——

Senator LIEBERMAN. I think you used a phrase before which I thought was right on target, which is the right way to look at it, which is that you want to create a climate among your licensees that not only discourages retaliation against an alleger or whistle-blower or whatever we call them, but that rewards an employee that comes forward with a safety recommendation. That's really what we——

Mr. SELIN. That's exactly right.

Senator LIEBERMAN. And it is not easy, because in some ways that's a nuisance or can be a nuisance to the licensee, and so it may be counter-intuitive in some ways, but critical.

Mr. SELIN. I'd also like to correct a couple of things that were said earlier in this context.

Number one, it is not necessary that the allegation be an important technical issue. We want people to come forward and we'll figure out if it is important or not. So people who come forward with dumb ideas and old ideas should be protected also.

We don't have that many Blanches that come forward with two home runs on two rather major issues. Every person who hears something or knows something should come forward, as well.

The second is that there has been a lot of discussion about heavier penalties at the end and things like that. We'll look at these,

but heavier penalties mean higher standards of proof, which mean a longer process and not a shorter process, so there is a real trade-off between hitting people with a bigger stick at the end and moving more quickly at the beginning, and that has to be looked at very carefully.

The third point, which is related to the second, is more use of criminal has the same problem.

But the fourth one, and the one I'd like to stress over and over again, is we can and should and will do a better job in the enforcement area. I think we do a pretty good job, but we can do better within our current statutory authority.

The real pay-off is to get the prevention part of the program out, and that leads to the fifth point, which is: if what we set up is a program that leads everybody to avoid going to their employers and comes directly to the NRC, that is self-destructive.

We need to make the licensees operate their plants safer and provide protection around the edges for what I hope will be the pathological cases, not subvert the basic process, which is: they operate, we regulate.

Finally, I would like to make a couple of points on Mr. Blanch's testimony, if I might.

First, it goes without saying—but I'll say it anyhow—he as a gift for hyperbole, which I think is amusing but not useful in this particular environment.

The second is that his analysis of the results of the two situations he found we consider to be overdrawn. They are clearly important safety issues, but not anywhere nearly as catastrophic as painted, and at some point we can go into that.

But the third point, which is the most important point, is that he did a terrific job on not one but on two issues. His employer responded to the substance powerfully and positively and quickly. That should have been a terrific success story. They should have rewarded him for finding these issues. They even followed up and fixed the issues. They didn't deny the issues. It should have been a great success story.

Instead, he gets harassed. He did say that we move really quite quickly and that we took very broad action. Yet, the results were unsatisfactory.

To me this is not a sign of a system that is working badly; it is a sign of a system that is working well and still not achieving what it is supposed to achieve, which leads me to believe that, with all due respect, Mr. Chairman, that the focus of the meeting so far has been on too narrow a set of issues.

We can do 100 percent perfect job on every point that has been brought up and still have unsatisfactory results.

There is another example. The IG did another report last year in 1992 where he looked at the process of our allegation management system and all that. IG's don't come to positive superlatives. They lose their jobs if they do that. But he said, all things considered, pretty nice things about the process. Yet, the results are not satisfactory.

So just concentrating on the process is unlikely to solve the problems that we have. We think we have to go——

Senator LIEBERMAN. So what should we do?

Mr. SELIN. I think we have to do all the things that have been discussed, or at least look at them. And we have a group that is set up to do it. It is a powerful group. But their charter has to include, and it will include, to go beyond the enforcement process and look at steps to prevent the harassment and intimidation in the first place.

Senator LIEBERMAN. So you are going back to the climate in the facilities?

Mr. SELIN. Yes, sir. I think personally, that's where the emphasis has to be. Otherwise, we have a situation where the worst that can happen to a licensee is that he has to make up to the employee what he shouldn't have done in the first place and fix the problems that he should have done in the first place, and maybe run the risk of some kind of an enforcement action three or four years later.

We need to have that. Nobody is saying we should do without police forces. But we need to—personally—this is not a Commission view. We haven't discussed it. But, personally, I believe that it is at least as fruitful, and maybe more fruitful, to concentrate on preventing the discrimination in the first place and not just looking at ways to remedy it or punish it once it has happened.

That's the end of my statement, Mr. Chairman.

Senator LIEBERMAN. Thank you, Mr. Selin.

I agree with you—although I guess with the amendment that maybe you agree with me, too—that both are important.

Mr. SELIN. Yes, sir.

Senator LIEBERMAN. Obviously, the best thing of all is if you can create a climate within the powerplants and the other material licensees where people are encouraged to come forward.

Again, history has shown—we have heard this morning—you have described Mr. Blanch's—skipping over your points one and two in your reaction, you have described him essentially as the Hank Aaron of nuclear whistleblowers—two home runs here.

So we know that some of these whistleblowers are playing a critical role, and we also know that some of them are suffering retaliation, by your own statement today, in far too many cases. So we have got to work together to make it better.

If you can create the climate within the facilities that encourages and rewards safety complaints, then that's the best of all because it happens quickly.

Part of the irony here is that—and this is part of what some of the whistleblowers have said to the subcommittee—is that if they complain internally and things are resolved, there is no problem; if they get either so frustrated that there is not a response internally or they simultaneously complain inside the company and go to the NRC, that's where they get the problems.

Mr. SELIN. Unfortunately, if they come directly to the NRC they probably will be pretty much protected. There is nothing wrong with protecting people that come to the NRC, but we have to make sure that people who don't come directly to the NRC are equally well protected. Otherwise, we are going to end up with a complete abdication of responsibility by the licensees.

Senator LIEBERMAN. By the companies, by the licensees. Absolutely.

Let me just ask you if you have any response. Well, let me start with another question.

Mr. SELIN. I just wanted to ask you: do you want me to rectify some of the misstatements about the numbers that have gone forward, or do you just want to do that for the record?

Senator LIEBERMAN. I was about to ask. I'm going to get to that. If I haven't asked a question that you can answer, you are free to submit—let's see how this goes.

The first thing I wanted to say is that I was struck by the 3,900 allegers or allegations. That seems like a large number to me. While we know that the 609 ended up being harassment or intimidation complaints.

This really gets to a more general, personal, intuitive reaction from you, but are you surprised at the number that you have found since you have been at the NRC?

Mr. SELIN. No.

Senator LIEBERMAN. Not all of them are obviously legitimate or real, but enough of them are that something——

Mr. SELIN. Roughly speaking, about one-third of the allegations turn out to have both merit and timeliness to them. A lot of times the allegations are corrected but, in fact, steps have been taken, although the employee doesn't know it, and therefore there is a time lag.

I don't think that's too large. To me that's evidence the process works. If we are getting 3,900 allegations and the licensees are getting some large multiple of that, clearly people are making allegations, so we do have an allegation process.

It doesn't mean it shouldn't be better, but if you take a look and say, "Is this process a little bit off and can be improved, or is it broken down?" then you have a very different situation.

Senator LIEBERMAN. Let me just come at that another way.

Mr. SELIN. Can I just follow up on one thing?

Senator LIEBERMAN. Go ahead.

Mr. SELIN. Of the retaliation complaints, fully one-quarter of them come from TVA and other construction projects in TVA.

TVA has got a lot of work to do—I am not at all justifying this—but this construction projects are qualitatively different from operational projects. You have a lot of tourists, a lot of amateurs, a lot of people that are really just picked up in labor gangs outside of groups, as well as the professional. They have neither the identity with the licensee nor the experience in route operations. And also, they are episodic. They are going to lose their job.

So they have a lot of reasons to come forward that you don't see on operating projects. One of the things we are going to look at in great detail before Lockspar is allowed to load fuel will be whether they, in fact, have a good process to deal with the allegations and are dealing with them, whether it is a sign of labor unrest or just one of those things.

But you really have to treat construction project allegations as being qualitatively different from operating plants such as Mr. Blanch and Mr. Mosbaugh described.

Senator LIEBERMAN. Let me ask the question I was getting to in a different way—and I don't want to dwell on it too long. But does the 3,900 allegations over the five-year period—and presumably a

multiple of those, as you have said, within the companies, themselves—should we draw a conclusion that says that there is a real safety management problem out there among the licensees? Or does it say that this is just inherently a very complicated process? Or does it say that employees are overreacting, even though, as we have heard today and the IG has testified, a lot of the whistleblowers are really getting to the meat of some very serious concerns?

Mr. SELIN. I personally don't think employees are overreacting. If you look at a police blotter and you get a lot of arrests, does that mean your police are doing a good job or a bad job? It is hard to tell. You need to know more than that.

As the IG has pointed out, we don't have as good an information system as we would like. In fact, most of the information we don't have is because we don't get all the information from the Department of Labor. We have pretty good statistics on our own activities.

We have looked, in preparation for the hearing, at the 609 harassment and intimidation cases much more than at the other 3,200. I am prepared to discuss those.

Over 50 percent come from five licensees. That's 5 out of 71. So what I believe is the case is that when we are getting an average of five to ten H&I allegations per licensee per year, there is a problem there. That's something that has to be looked into, and that's why I speculated that an inspection process that would allow us to focus our inspections on places where we have seen indicators of some problems that we didn't have to just do it across the board to all 71 licensees might be highly desirable.

But it is very hard to draw a general conclusion as to the universe. There are lots of people from whom we get no allegations at all. Does that mean that they've got the people so terrified that they are afraid to come to the NRC? Do they do a terrific job? Or is it some place between?

We think if they were so terrified we would find that out. I have personally visited two-thirds of our plants. At every one of them I ask the resident inspector if people come to him. Do they talk to him? Does he hear things that he hears from the staff first, not the management?

In almost every case they say that the employees seem to feel reasonably free coming to the inspector. That doesn't mean that we don't have problems, but I don't think we have massive intimidation at the power plants.

Senator LIEBERMAN. At this point in the system do you do anything special with regard to—going back to your criminal analogy—what we call repeat offenders?

Mr. SELIN. Yes, sir. We have, in the famous section 515, a manual on inspections, and it does have a section that says, "When do you look at the cases before you without just turning them over to the Department of Labor?" Upon close cross-examination, there does not seem to be an enormously high correlation between the critiera and what we actually do but, in fact, we follow the criteria and then some other criteria.

Egregiousness of the complaint or licensee history are two of the four characteristics that figure into that.

For instance, we did get a complaint of a systemic problem at one of the TVA plants. We just got that a couple of weeks ago. We got three inspectors down on that immediately to find out if it was there. If it has got TVA on it we are going to look at it pretty carefully because of the history.

I believe a lot of the complaints are left over from the time they had worse labor relations, but we have to look at those.

Senator LIEBERMAN. I don't want to reach a conclusion, but you sure worry about the fact that they've got a problem there.

Mr. SELIN. Yes, sir. Well, one is Northeast Utilities, or Millstone, and one is Comanche Peak. I believe that we are not going to have serious problems with these people.

Senator LIEBERMAN. I agree. On the case of Northeast, which I am familiar with, I think they have received enough adverse attention.

Mr. SELIN. That's why I really question whether we need more than $100,000. A $100,000 civil penalty coupled with the steps that we have taken in putting the senior people personally on notice in the written complaint in the demand for information are pretty strong steps.

Houston Lighting and Power is a company which is on our watch list, which is the subject of a huge amount of attention right now.

And Arizona Public Service has had a long and not distinguished history in dealing with its whistleblowers.

TVA is the fifth.

Senator LIEBERMAN. Those are the five? Let me ask you about the numbers. Perhaps you are not prepared at this time to answer, but what about the discrepancy between the substantial number of cases in which the Department of Labor finds for the alleger or there is a settlement—depending on how we count the settlements, it is between one-quarter and one-third—and the fact that NRC was down to about 7 enforcement actions out of the 609? Can we draw any conclusions from those?

Mr. SELIN. Yes, sir.

First of all, one conclusion you can draw is it takes a long time. We actually had 20 enforcement actions during the time period, and 13 of them started before the time period began, so it takes a long time.

The second is that the IG's figures, of course, are quite accurate—I mean, they were jointly developed—but they are a little bit misleading because of the 159 cases, for instance, that were found for the licensee, there were only 85 final decisions. Of the 58 cases that were found for the allegers, there were only 8 final decisions.

There are three steps along the way, so there is one——

Senator LIEBERMAN. Meaning they are on appeal?

Mr. SELIN. They are on appeal. And as I reluctantly admitted, until 1992 we didn't even get into it until all the appeals were finished if they were on appeal. So the DOL process takes a long time. We were not as active a few years ago as we are now, or proactive. We basically said, "DOL is taking care of it. We will worry about something else," instead of saying, "What can we do without disturbing the DOL process?"

We have 44 cases. Of the 609 cases, 125 were considered by the Office of Investigations for full-scale investigation. That number is

not crazy. More than half of them were either rejected or the allegers dropped out. I think 44 is a low number, but it is not as crazy as I thought it first was when the IG briefed me on this.

Senator LIEBERMAN. Yes. I presume that your senior-level panel will take a look at that to get into it, as I know the IG will, by his testimony, just to make sure that it doesn't suggest or reveal a flaw in the process before the NRC.

Mr. SELIN. There is one thing that—there are a lot of things we are going to look at, but one of the things we have looked at that is particularly open to consideration is part of the general feeling that H&I maybe isn't quite as important as technical safety questions.

In other words, if we look at a complaint, one of the criteria that is used in deciding whether to evaluate the complaint fully is how serious is the technical part of the complaint.

That has got to be reexamined because if it is an egregious case of discrimination, even if it were a less important technical safety issue, it probably should be investigated at least as much or more than a case of light discrimination coupled with a serious technical safety issue.

We may have been putting too much weight on the safety significant—short-term, narrow definition safety significance of the substantive or the technical part of the allegation, as opposed to looking at the organizational part and saying, "What does that tell us about the atmosphere at the licensee?"

If we are going to investigate an H&I complaint for enforcement, the key question is what is the harassment and intimidation, not how good a complaint it was in the first place.

Senator LIEBERMAN. Okay. I appreciate your testimony.

The panel is supposed to report back this fall in October?

Mr. SELIN. Yes, sir.

Senator LIEBERMAN. And the Commission and the subcommittee worked together I thought very productively on other matters so far this year, and I hope we can do so. Again, it is one which we all acknowledge, with differing degrees of vision about how bad the situation is now, that it needs to be improved.

I am going to also bring in the Department of Labor soon to pursue their process independently so that we can bring it together.

The question remains as to whether, in addition to some of the extension of times and jumping in earlier, as you are doing now during the DOL process, whether we ought to—because of the seriousness of whistleblowing in these cases, more serious than most any other in the Government, we ought to try to consolidate the process.

Mr. SELIN. But may I just say a couple of things?

I know I should accept your kind words with thanks and go to lunch, but I really think it is useful to leave a couple of thoughts with you and the staff.

The first is that a lot of the suggestions you have heard have to do with the NRC getting in earlier and freezing the Department of Labor out. In fact, that goes directly counter to protecting the employees, themselves, since we can't give them remedies. We can just punish.

Senator LIEBERMAN. Understood. Yes. That's the problem.

Mr. SELIN. The second point I made before, but I think it is still worth making again. The enforcement process is an easy target. We can improve it, but I think if we did everything everybody suggested we would come back a year or two years from now and you would be just as unhappy as you are now—and I'd be more unhappy, because I would have spent two years of my life doing this. We can't just stop with the enforcement process.

The third is we have plenty of authority to do more than we are doing. It is not that there won't be some places where legislation would conceivably be useful, but I don't believe we have come close to exhausting the authority we have. Therefore, in good conscience, the Commission has directed the staff not to look at statutory changes.

Congress just acted on whistleblowing last year. To go back to the Congress again could be reasonably interpreted as an abdication of responsibility rather than as the willingness to take big steps.

The fourth is my personal belief that the process works pretty well in the sense of health and safety, but there are too many bodies along the way. There is too much damage being done. Since we can do better, we have to do better. But I personally do not say that this is one of the three biggest safety issues facing the group.

The fifth one you didn't ask me here but you asked me in the letter of invitation: it is far from proven that increased resources in the inspection and enforcement activity are called for. There are so many ideas about how to do better with the resources that we have now that we are going to first look at what we can do just through cultural adjustment, top-level management, a little more clever stuff before we start looking for either resources or legislation.

Senator LIEBERMAN. I suppose I should move on to the next witness, too, and not comment.

But, on the other hand, I do want to say I don't know what the other three safety problems are, but this is such a pervasive network that you have out there at your disposal, that we have out there to protect us, which is to say the thousands of people who work on the front lines of nuclear licensees, that we—it has worked well for some people, but clearly not worked well for a lot of others, not only as evidenced by the testimony of the two witnesses, but by the report of the Inspector General, passionate or dispassionate as it was.

We are going through a reorganization now of the NRC, as you know. It is possible that we might consider attaching to that some alterations in these procedures.

But my first hope would be that this could be done by you within the authority that you have now, and that's why we want to keep in dialogue on what the suggestions of this panel are if we can do it. If we can feel that we have made sufficient changes without legislation, I'll be very happy.

Mr. SELIN. Mr. Chairman, your hearing and some of the other things have clearly caused us to look a lot more closely at our process than we would have looked otherwise.

Senator Simpson graciously asked that we be permitted to carry through with our study before you consider new legislation. I would

hope that the subcommittee would feel comfortable going along with that approach.

Senator LIEBERMAN. I do want to state for the record that the matter of the tapes earlier was a difficult one for us. I am going to admit into the record two letters—one that we requested from Senate legal counsel on the legality of using the tapes, which was strongly in favor of that; and a second was a letter that I appreciate that we received from yourself on behalf of the Commission, not directly on the question of using the tapes at the hearing, but reaching your conclusion that legal surreptitious taping by an employee of personal conversations—conversations to which the employee is a party—with the intent of providing the information obtained to the licensee or the NRC is an activity subject to protection under 211.

[The material referred to follows:]

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WASHINGTON, DC 20510-7250

MEMORANDUM

To: Dan Berkovitz

From: Claire Sylvia

Re: Legality of the tape recording of a conversation by a party to the Conversation

Date: July 1, 1993

INTRODUCTION

As you prepare to meet with representatives of a nuclear power company that is the subject of some tape recorded conversations provided to the Committee on Environment and Public Works, you have requested our opinion on whether the tapes were lawfully obtained. According to the individual who provided the tapes to you, the tapes are recordings of a number of conversations to which he was a party, most of which were over the telephone, but some of which were in person. All of the recordings took place in Georgia, although some of the recordings are of interstate telephone conversations, initiated in Georgia and received in Alabama.

Based on the facts as described above, it appears that the taping of the conversations did not violate federal or state law. Federal law does not prohibit the taping of telephone conversations by one party to the conversation. Neither Georgia nor Alabama prohibit taping by one party to the conversation. During your meeting with representatives of the company, however, you should seek to learn whether they have information about the circumstances of the taping of which you are not currently aware and which might change this analysis.

This memorandum addresses only the narrow question you posed concerning the legality of taping conversations under the circumstances described above. You should be aware, however, that there are broader issues concerning the propriety of one-party consensual tape-recording in other circumstances. The practice has generally been looked upon with disfavor by the Senate, which has on several occasions considered legislation that would restrict it. The practice may also be unethical if engaged in by an attorney, and may be prohibited for certain executive branch employees.

1. The Constitution Does Not Prohibit the Practice

Legal analysis of the issue of taping telephone calls and other conversations begins with the Supreme Court's determination that the Fourth Amendment's prohibition of unreasonable searches and seizures does not apply to the recording of conversations in which one party tape-records a conversation in which he or she participates. *Lopez v. United States*, 373 U.S. 427, 438-39 (1963). The Court has distinguished such recording from electronic eavesdropping or wiretapping by a third party. *Id.* This type of recording is known as "consensual" monitoring, because one of the parties to the conversation -- the individual who is recording it -- consents to the recording of the conversation. The courts have reasoned that, when someone chooses to participate in a conversation with another individual, he or she has no legitimate basis for expecting that the individual will refrain from disclosing the substance of the conversation to someone else, whether through testimony or a tape recording. *Id.*

2. Federal Law Does Not Prohibit the Practice

In line with the Supreme Court's reasoning, the Congress has legislated restrictions only on wiretapping conducted by third parties. This law, which is known as Title III because it was enacted as Title III of the Omnibus Crime Control and Safe Streets Act of 1968, expressly states that it does not prohibit electronic recording of "wire, oral, or electronic communication" by "a party to the communication," unless the recording is done "for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State." 18 U.S.C. § 2511(2)(c)-(d) (1988). Aside from that exception, federal law does not prohibit an individual from recording a telephone conversation in which he or she is a participant.[1]

One other source of federal law are the regulations that the Federal Communication Commission has issued concerning taping conversations, but which do not apply directly to telephone users. The regulations require telephone companies to include in their interstate tariffs provisions requiring individuals who tape-record interstate calls without mutual consent to use a repetitive beeping signal as a warning that the con-

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[1] Based on the representations of the individual who provided the tapes to the Committee, it would appear that his purpose in taping the conversations does not fall within one of these exceptions. However, this may be one area to explore with the company representatives to ascertain whether they have additional information that would change this analysis.

versation is being recorded or to notify all parties that the conversation is being recorded. 47 C.F.R. § 64.501 (1992).

3. *Neither Georgia not Alabama State Law Prohibit the Practice*

A number of states have made one-party tape-recording a criminal offense, but neither Georgia nor Alabama are among them. In Georgia, the Supreme Court held that section 6-11-32 of the Georgia Code, which declares it unlawful to clandestinely record the conversations of another, does not prohibit one party to a conversation from secretly recording a conversation to which the person is a party. *State v. Birge*, 240 Ga. 501, 241 S.E.2d 213 (GA), *cert. denied*, 436 U.S. 945 (1978); *see also Parrott v. Wilson* 707 F.2d 1262, 1271 n.18 (1983)(noting that "Federal and Georgia law prohibit only clandestine taping by persons who are not parties to the conversations"). Alabama prohibits eavesdropping, but defines it as the recording of "the private communication of others without the consent of at least one of the persons engaged in the communications." Ala. Code. §§ 13A-11-30, *et seq*. Where, as here, one party to the conversation is recording the conversation, "at least one of the persons engaged in the communications" has consented and the prohibition does not apply.

CONCLUSION

The tape-recording in Georgia of conversations by a party to the conversation, violates neither federal law nor the law of Georgia. While some of the recorded conversations were of interstate conversations between individuals in Georgia and Alabama, Alabama state law also does not prohibit recording where one party to the conversation consents.

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

CHAIRMAN

July 14, 1993

The Honorable Joseph I. Lieberman, Chairman
Subcommittee on Clean Air and Nuclear Regulation
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This responds to your letter of June 11, 1993, in which you requested the Nuclear Regulatory Commission's views on whether one-party taping of conversations by employees of NRC licensees could constitute, in some circumstances, protected activity under section 211 of the Energy Reorganization Act of 1974. You also suggested that it would be appropriate for the NRC to communicate its views on this issue to the Department of Labor.

In general, the NRC believes that attempts by employees of NRC licensees, contractors, or subcontractors ("employee") to gather evidence relating to nuclear safety concerns at NRC-regulated facilities or to gather evidence of discrimination related to the reporting of safety issues for purposes covered by section 211 of the Energy Reorganization Act, 42 U.S.C. Sec. 5851, are activities subject to protection under that section. In the context of the Committee's letter, the NRC believes that legal surreptitious taping by an employee of personal conversations, to which the employee is a party, with the intent of providing the information obtained to the licensee or the NRC, is an activity subject to protection under section 211.

Although the activity may be within the scope of activities protected under section 211, employment may still be terminated (or other employment action taken), if the employer can demonstrate by clear and convincing evidence that it would have taken the same unfavorable action in the absence of such behavior; i.e., for legitimate, non-discriminatory reasons, including whether the activity was carried out in an unreasonable manner or in violation of law. Thus, while the Commission recognizes that attempts by an employee to gather evidence of safety violations or related discrimination in some respects could have a disruptive effect on the workplace, the mere potential for interruption of routine conduct of operations that may be caused by reasonable whistleblower activities should not be a basis for disciplinary action against an employee. For this reason, determination of whether an employer may terminate or take other employment action against an employee who has engaged in an activity subject to protection under section 211 will

depend on the specific facts and circumstances of th
case. Lawful taping of conversations to which the en
party to obtain safety information, carried out in a [illegible] and
reasonable manner, for the purpose of promptly bringing such
material to the attention of the licensee or the NRC, should not
be a valid basis for terminating an employee.

Once an employee has acted to gather evidence, the employee
should inform either the licensee or the NRC, of the employee's
actions. Prompt notification is in the public's interest because
it enables the NRC and/or the licensee to act promptly to protect
public health and safety, to recognize and correct any possible
safety violation, or to address any possible discrimination.
Surreptitious taping properly carried out under the direction of
the NRC should afford the employee protection under section 211
of the ERA for such action.

By copy of this letter, we are communicating our views on these
issues to the Department of Labor and are also serving it upon
the parties participating in the Department of Labor proceeding,
Mosbaugh v. Georgia Power Company.

Sincerely,

Ivan Selin

cc: The Honorable Robert B. Reich
Parties to the Mosbaugh proceeding
(Alan Mosbaugh)
(Georgia Power Company)

Senator LIEBERMAN. Again, we are not reaching a conclusion on the question of whether Mr. Mosbaugh's particular use of the tape and his termination for that reason was correct or incorrect, but I appreciate the standard that you have set down here because I think it is one of those things that will—you hope that people don't have to resort to taping; on the other hand, if there is a serious safety problem and it is done legally, it may be the best evidence and incentive to correct the problem, so I thank you for that.

Mr. SELIN. Thank you very much.

Senator LIEBERMAN. Thank you.

We'll call the final witness, who is a representative of the American Nuclear Energy Council, Jerome Goldberg, President of the Nuclear Division of Florida Power and Light.

Mr. Goldberg, you get the award for patience today.

Would you please raise your right hand?

[Witness sworn.]

Senator LIEBERMAN. Thank you, sir.

We appreciate your being here and look forward to your testimony on the general question of how well the whistleblower statute and procedures are working now and how important they are to the industry.

TESTIMONY OF JEROME GOLDBERG, PRESIDENT, NUCLEAR DIVISION, FLORIDA POWER AND LIGHT, ON BEHALF OF THE AMERICAN NUCLEAR ENERGY COUNCIL

Mr. GOLDBERG. Thank you, Mr. Chairman and members of the subcommittee.

My name is Jerry Goldberg. I am the President of the Nuclear Division of Florida Power and Light Company.

Florida Power and Light owns and operates four nuclear generating units, two at its Turkey Point site near Homestead, Florida, and two at its St. Lucy site near Fort Pierce, Florida.

I am here today, however, on behalf of the American Nuclear Energy Council, which represents over 100 companies with an interest in nuclear energy, including investor-, public-, and cooperative-owned nuclear utilities and other firms involved in the industry.

I have been asked to present the industry's views on the operation of the employee protection provisions of the Energy Reorganization Act and their implementation by the NRC and the Department of Labor.

A brief summary of my background may be helpful to the subcommittee.

I graduated from the United States Merchant Marine Academy at King's Point and hold a master's degree in nuclear engineering from MIT. Following a period of active duty in the Navy, I began my nuclear career at the Qunicy shipyard, designing and constructing nuclear power warships for the United States Navy.

I have devoted my entire professional life since 1971 to the commercial nuclear industry, first with one of the Nation's leading architect engineering companies, where I was involved with the design, engineering, and construction of more than a dozen power plants; and for the past 13 years as head of utility nuclear programs, including the past four years at Florida Power and Light.

My remarks today before the subcommittee are extracted from my written testimony, which has been filed with the subcommittee, and I ask that the full text be incorporated in the record.

Senator LIEBERMAN. It will be. Thank you.

Mr. GOLDBERG. This is an important and serious matter. I am, therefore, honored and pleased that you have invited me to share with you my experience, observations, and views.

My testimony focuses on three related matters: the important role played by employees who identify safety concerns, the NRC/Department of Labor interface in dealing with section 211 cases, and the timeliness of their respective activities; and, last, the relationship of these factors to public health and safety.

I approach the subject with one fundamental premise: employees in the nuclear industry who identify and report safety concerns perform an invaluable public service. In the nuclear industry, our design philosophy is referred to as defense in-depth.

In using that term, we usually focus on the many backup hardware and engineering safety features that protect the plant and the public. But of equal or greater importance to the safety concept are the tens of thousands of highly-trained and motivated people involved in the operation and support of nuclear power plants and their related facilities.

We ask these people to do more than their assigned tasks. We count on them to serve as an extra set of eyes and ears to identify safety concerns, to alert us when tasks are not being performed as required, and to advise us of any other problems which they are uniquely positioned to recognize.

My experience is that they do an outstanding job in bringing their insights and concerns to management in a thoroughly professional way.

It is also my experience that with few exceptions the industry's employees feel free to raise safety concerns directly with management. The more than 100,000 employees in the industry discuss with management on a daily basis numerous issues involving various safety concerns, which are thoroughly reviewed and resolved. This is not surprising. These employees, as I have said, are professionals, and they work in an industry which encourages open communication not only because it contributes to safe operation, but because it makes good business sense.

I therefore feel some regret that we have come to refer to these particular employees as whistleblowers when, in fact, their contribution is welcomed, encouraged, and expected.

Perspective is crucial when considering the adequacy of the existing process for handling 211 complaints. My experience is that the overwhelming preponderance of significant safety concerns are raised through one of the many normal mechanisms widely used in the industry.

I discuss this background so that you will understand the norm in the industry as you consider and hear testimony about situations which are truly departures from the norm.

A relatively small number of employees, about 120 each year from the total national work force file complaints under the Energy Reorganization Act. Only a small percentage involve instances of abuse of extreme ends of the spectrum; that is, either isolated ex-

amples of real retribution, generally by lower-level managers against employees who have raised concerns; or the other extreme—employees who have tried to game the system to realize economic advantage.

I have seen about an equal number of examples of both extremes.

It has been argued that the present system is slow and therefore discourages section 211 complaints. Let me address the Department of Labor process first.

Initial Department of Labor investigations of complaints are usually completed in less than 60 days. The Department of Labor may also mediate a resolution in appropriate cases.

If the matter is not resolved at this stage the losing party has a right to a hearing before an administrative law judge. Generally, the administrative law judges waste little time. The average period from notice of appeal to issuance of a recommended decision is less than 18 months.

The only potentially frustrating delay is obtaining a final decision by the Secretary of Labor. I cannot explain the reason for that, but I doubt that legislation is necessary if the problem is one of administrative efficiency.

Moreover, I understand that this problem is addressed in part by last year's amendments to section 211, under which a wrongfully terminated employee may be reinstated pending appeal.

The process works reasonably well on the NRC's side. The division of responsibilities between the NRC and the Department of Labor in whistleblower cases is logical, given their respective missions and expertise.

The primary mission of the NRC is protecting public health and safety, while the Department of Labor is employee/employer relations. Neither should have its focus diverted into the other's jurisdiction while investigations are being conducted.

Therefore, the NRC has historically and wisely stayed its hand with respect to employee/employer relationships that fall within the jurisdiction of the Department of Labor.

However, the NRC will, in appropriate circumstances, send a chilling effect letter if the initial Department of Labor investigation finds in favor of the employee. The letter requires a licensee to explain the circumstances of the case and the steps being taken to assure that other employees are not discouraged from raising safety concerns.

I want to emphasize that these letters are taken very seriously by licensees. It is a signal that part of our defense in-depth may be impaired, with the related potential for serious regulatory consequences.

Keep in mind that the chilling effect letter is independent of the NRC's action on the underlying safety concern, which the Commission deals with promptly, either prior to or in parallel with the Department of Labor's initial investigation into the related discrimination complaint.

With rare exceptions, the safety concerns associated with section 211 complaints have been addressed prior to initiation of any complaint.

If the administrative law judge's decision is adverse to the employer, the NRC may issue a notice of violation and civil penalty.

Penalties assessed for violations of this type, regardless of the amount, are matters of deep concern.

I doubt that more-severe penalties would have any material effect on the steps which licensees currently take to promote free communication of safety concerns, as well as protect their reputations against claims of intimidation and harassment.

Companies also take action against defending managers, and these actions are reviewed by the NRC. But unless there is an egregious situation that clearly justifies NRC sanctions against an individual manager under the wrong-doer rule, further Federal action is not warranted.

Moreover, the power to invoke such sanctions must be exercised with great care, since it may have the effect of destroying an otherwise distinguished career on the basis of a single incident.

It has been argued that the present process is long and arduous, that it discourages the filing of complaints, and that the NRC should interpose its investigative and enforcement functions at an earlier stage.

I disagree for a number of reasons set forth in the full text of my testimony. To cite a couple of examples:

First, aside from the waste involved in duplicative and overlapping investigations which would require substantial additional NRC resources, earlier aggressive NRC intervention may further polarize employment relationships, thereby interfering with the Department of Labor's mediation efforts.

Second, earlier and more aggressive enforcement action by the NRC may prejudice the outcome of the Department of Labor case and chill the management decision-making process.

If discipline and attention to detail are the hallmarks of a well-run plant—and I will attest to that—then management must be able to take legitimate personnel actions that are in the interest of safety and reliability. If they delay or fail to do so because they fear the outcome of related legal proceedings, or the consequence of a lower threshold of more severe NRC enforcement action, this would run counter to the public interest in safety.

In summary, industry believes the present process works reasonably well and, where it is not, recent legislative and policy changes should be allowed to work. No further changes are warranted to assure identification of safety issues, and, most importantly, the system achieves a balance which serves the public interest in safe nuclear operations. It is a delicate balance which should not be upset in the absence of a compelling reason, and we do not see one.

I appreciate the opportunity to share these thoughts with you and would be happy to answer any questions.

Senator LIEBERMAN. Thank you, Mr. Goldberg.

Let me ask you at the outset here the same question that I asked Chairman Selin, which is—and I build it on the fact that I have been surprised, first as just a Senator from Connecticut, in the number of whistleblower complaints, and then complaints from the whistleblowers about harassment that I received, and now, having come to the chairmanship of this subcommittee, how many complaints like that I have been receiving from around the country, which engendered this concern and this hearing.

This number 3,900 over the five years seems like a lot of complaints. I know not all of them are from power plants. Some numbers have to do with materials licensees.

Even 120 a year that allege retaliation are substantial. About 60 of the cases before the Department of Labor have been found for the alleger. Maybe that is 12 a year over the 5 years.

Again, as I said at the outset, human nature is human nature. People are not perfect. But I would like you to respond to my layman's reaction in this case that in this activity, which is one with great implications regarding safety, this is an unacceptably high number of complaints and complaints that reach—that seem to have some validity to them.

Mr. GOLDBERG. I can't really get a good feel just based on the number. I think it would be very interesting to know within that 3,900, for example, how many were related to perhaps construction programs that were winding down.

For example, in an earlier career assignment I was responsible for the completion of two very large nuclear units, and at the peak we had some 11,000 people that were working on that job.

As that job was winding down and more and more people were receiving lay-off notices, we had an unquestionable pattern of people who would quickly file safety concerns. Some, of course, may have been relatively minor issues. Some, of course, may have been more important. But the sheer volume and the timing of them I think was more than a coincidence.

These people were setting the stage for first filing concerns, and then, upon receiving their lay-off notice, literally by the hundreds they were contesting that they were, in fact, being laid off not because it was time for them to go, but rather that they had filed safety concerns.

That's just an example. I'm not suggesting that explains the 3,900. But I think it would be very important to look inside that number to know what portion of them may well be of that genesis as opposed to people working at operating stations.

Senator LIEBERMAN. Yes. You said something earlier on in your testimony which I though was interesting and significant, and which I agree with, which is that, in addition to every other reason why a licensee should want to encourage safety complaints or suggestions about improving safety from employees, it makes good business sense. That is the phrase that you used.

Mr. GOLDBERG. Yes, sir.

Senator LIEBERMAN. And this may venture beyond what is easy to answer, but, as I read over some of these cases—and, again, it is difficult to ask the question, because in Mr. Blanch's case the utility quickly responded, and in Mr. Mosbaugh's case, which is subject to argument, I understand, at least by record it appears to have been a slower response.

Why wouldn't a company, if it received a safety suggestion or complaint from an employee, not want to respond quickly just from a good business point of view?

Mr. GOLDBERG. From my experience, we try desperately to respond quickly. My company happens to operate one of the systems that Chairman Selin made reference to. We do, in fact, have an independent group whose sole purpose is to solicit, interview, and

investigate employee concerns, and carefully and with great dedication protect their identity.

Senator LIEBERMAN. Talk a little more about that. It is an interesting example. Independent in the sense that they are from outside?

Mr. GOLDBERG. They are employees of our company.

Senator LIEBERMAN. Right.

Mr. GOLDBERG. But they are chartered specifically for the express purpose of doing the interviews and doing the investigations. They report directly to an officer of the company.

Senator LIEBERMAN. These are investigations of——

Mr. GOLDBERG. Of the allegations that we receive from the employees. And we make a point to get back to those employees to share with them the results of those investigations. And even when an employee is incorrect, either because he doesn't have all the facts or, conceivably, it is a matter that has been resolved, we commend that employee for coming forward.

It is unimportant whether or not what was presented proved to be significant. The fact that they took the initiative and shared it with us is important.

Senator LIEBERMAN. Have you had any whistleblower complaints filed with the NRC against the company?

Mr. GOLDBERG. I believe we have. I would say it is something less than six over the——

Senator LIEBERMAN. Were they harassment and intimidation complaints?

Mr. GOLDBERG. One of them was. Yes, sir.

Senator LIEBERMAN. I'm surprised that would happen in light of the system that you have just described.

Mr. GOLDBERG. Well, of course, it is a matter before the Department of Labor so it would be inappropriate for me to comment.

Senator LIEBERMAN. Understand.

Mr. GOLDBERG. But I am hopeful that it will demonstrate that our program is working.

Senator LIEBERMAN. Yes.

I don't have any more questions, Mr. Goldberg. Obviously you, within your facility, are trying your best. Maybe you are setting a standard here.

I hope that—again, I have heard your testimony where you say the system is working well. It seems to me that it may be working well for some people and may be working well in some places, but there are a lot of places it is not working well, and a lot of people.

My intention here is not to be punitive, certainly, but to try to improve the process just in the interest of public safety, which is obviously not only in the interest of the public but is in the interest of the licensees.

So I hope, as we have had these allegations from the whistleblowers, the conclusions from the Inspector General that something is wrong here—that the whistleblowers are not getting an adequate level of protection, to use his phrase—the statement by Chairman Selin that, while he feels it is working well in some ways, it is not doing as well as it should, I hope that we can count on the industry to be partners in working with us to try to improve this process and to create a climate that it appears you are trying to create in

your company that, as Chairman Selin said, not only protects whistleblowers but, in fact, rewards those who come forward with complaints that can improve safety.

Mr. GOLDBERG. I share that view.

Senator LIEBERMAN. And can we count on the industry to be working with us toward that end?

Mr. GOLDBERG. I think you can count on the industry. It is certainly in our self-interest to see this process work well.

Senator LIEBERMAN. Absolutely.

I thank you. I thank you for your patience. I thank you for your testimony.

The record of the hearing will remain open for three weeks for additional submissions of testimony—perhaps for some questions to be asked by members of the committee to various witnesses.

With that, I would formally adjourn the hearing.

[Whereupon, at 1:08 p.m., the hearing was adjourned, to reconvene at the call of the Chair.]

[Statements submitted for the record and the Inspector General's report follow:]

PREPARED STATEMENT OF PAUL M. BLANCH
FORMER SUPERVISOR, INSTRUMENTATION AND CONTROL, ENGINEERING
NORTHEAST UTILITIES, HARTFORD, CONNECTICUT

FOR

THE UNITED STATES SENATE
SUBCOMMITTEE ON CLEAN AIR AND NUCLEAR REGULATION

JULY 15, 1993

Good morning, Mr. Chairman, and other distinguished Senators. I am Paul M. Blanch, former Engineering Supervisor at Northeast Utilities ("NU"). Accompanying me is Mr. Ernest C. Hadley, the attorney for We The People—an organization that advocates nuclear safety and provides legal assistance to nuclear whistleblowers—and also my personal attorney. I appreciate this opportunity to provide this Subcommittee my opinions concerning the NRC's handling of "nuclear whistleblowers." At this time I would like to personally thank Senator Lieberman for his unwavering support. Also, I would like to acknowledge the legal and moral support of We The People, without which, I would have wound up like every other whistleblower-unemployed and destitute. I am thankful that I am presently only unemployed.

I am not here to tell my personal story, but to comment on the pathetic abuse suffered by all whistleblowers at the hands of licensees and the Nuclear Regulatory Commission ("NRC"). The NRC's Inspector General (IG) report released today cites more violations

of the rights of these individuals than those cited in the recent Navy IG report on the "Tailhook" scandal. I pray this Subcommittee will cause similar action to be taken against the violators of these innocent citizens, who I submit, in their own way have been every bit as ravaged as the victims of "Tailhook"

While the NRC and the industry have tried to make the term "whistleblower" a label of shame, I regard it as a mark of responsibility—to my profession and to my fellow citizens. The nuclear industry is what I would classify as a "closed" industry. It includes every organization involved from the NRC, the licensees and manufacturers, to research labs and even our universities. Because this is a highly technical industry, little is known of its technical and regulatory problems by individuals outside this "closed community." And quite frankly that's exactly how the industry would like to keep it. They prefer silence and cover-up to public disclosure and action. Consequently, the only credible criticism comes from within this closed industry, from the individuals it labels "whistleblowers." I despise the term "whistleblower." I prefer to think of myself as an "ethical resister"—that is, I resist the ethics of an industry that rewards loyalty over truth. I resist the ethics of an industry that values profits over safety. And, I resist the ethics of a government agency that regulates with a "nod and a wink" toward licensees, while turning closed eyes toward those who would dare question either the practices of the licensees or the regulator. Fortunately, I am not alone in my resistance.

But these responsible critics of the industry, whether you call them "whistleblowers" or "ethical resisters," risk all in speaking out. Through the inaction of the NRC and its refusal to bring enforcement actions against licensees; through the blatant character assassinations of whistleblowers carried out in the reports of NRC's Office of Investigation ("OI"); through terminations and "buy-outs" of whistleblowers by the licensees, the industry systematically eliminates its critics in a methodology not unlike "Ethnic Cleansing,"—or a more apt description in this situation—"Ethic Cleansing." The industry's "Ethic Cleansing" seeks to silence the voices of those whose only concern is nuclear safety and ethics. Given the certainty of the devastating consequences that befall so-called "whistleblowers." what other motivation could there be but the safety of our citizens? Any individual who questions either the inaction of the NRC or the licensee is conveniently and viciously discredited, demeaned, subjected to psychiatric examinations, portrayed as a radical or disgruntled employee and eventually "cleansed" by termination or "buy-out."

Individuals banished from the industry are then labeled as anti-nukes to further discredit them. I submit to this Subcommittee that these falsely maligned individuals are in fact the only ones who clearly demonstrate concern for nuclear safety—not the NRC which is charged with the highest accountability for protecting the lives of more people than any other Federal Agency with the exception, perhaps, of the Defense Department,

coincidentally by the use of this same nuclear technology.

Even though there are severe penalties specified for licensee retaliation—and what I've described here is nothing more than vengeful attacks on well-meaning industry employees—the NRC intentionally takes little or no action against licensees. In fact, the NRC actually encourages these actions! Let me illustrate with a brief account of the actions that led to my resignation from NU.

In 1988, I personally identified incidents of failure in Rosemount transmitters—a device used in reactor protector systems. The problem was not just that these devices had an unacceptable rate of failure, but that their failure could go undetected. By all indications, the device would appear to be functional when, in fact, it was no longer operable. This undetectable failure clearly violated the most basic NRC requirements—the failure of any device in a safety-related systems must be detectable. As a direct result of seeking a resolution of this issue with the NRC, I was continually harassed, intimidated and subjected to an internal audit resulting in the suspension of two of my employees. This harassment was directed by a number of NU Corporate Officers, yet, no meaningful enforcement or criminal action was taken by the NRC until 49 months later.

More than four years have passed since I first identified this problem, and there are still plants operating with defective Rosemount devices and no means of detecting these failures.

More recently, in May 1992, I identified a major deficiency

with all General Electric reactors that would disable the most vital reactor water level indicators during an accident. The consequences of this malfunction could be devastating. During an accident, as a result of this failure, the device would continue to indicate to operators that the reactor core was covered and being properly cooled, when, in fact, it could be melting! Coincidentally, I discovered this defect when I was asked by the NRC to review data from Pilgrim Station in Plymouth, Massachusetts, to help analyze a problem that Boston Edison was experiencing in its water measurement system.

This industry and the NRC denied the possibility of this occurrence, and decided to study the problem, knowing full well that every GE reactor was operating in clear violation of NRC regulations. When the testing was completed, confirming my initial evaluation, the NRC intentionally attempted to cover-up the results from my review. I was excluded from important NRC meetings on the subject and not allowed to participate in others. Meanwhile, the Commission relied totally on the representations of the Boiling Water Reactors Owners' Group ("BWROG") in concluding that this failure presents no danger to the public.

We have no idea which or how many regulations are being ignored or even if we have the potential for a Chernobyl-type accident in this country. Imagine, if you will, the chaos and panic that would grip our citizens should it become necessary to evacuate the millions of residents living within a 30 mile radius of Pilgrim site just outside of Boston! Still, the Commission

avoids direct questions about the safety implications of the failure and refuses to require that any of the effected plants conduct an analysis to determine if these devices can perform their intended function in the event of an accident. Analyses to determine if a device can perform its intended function, referred to as an operability determination, are required by every plant license. Instead, the NRC continues to allow 36 plants to operate outside of NRC regulations. Despite the facts, the industry continues to claim that its "Defense in Depth" concept provides adequate protection. And yet, clearly, there is no backup for these critical level instruments or the Rosemount transmitters.

My efforts to get the Commission to take action in this situation is well documented, as is the extreme harassment I experienced from my former employer and even the NRC[1].
Despite any differences I may have with my past employer, I would note that NU is the only utility to correct the water level instrumentation problem. As soon as we confirmed that the problem existed at the Millstone plant—i.e., that the measurement device was not operable—the plant was shut down. Under my direction, NU immediately set about finding a solution to the problem, and we did find a solution. Modifications to the system were made and the plant has now been operating for nearly a year without recurrence of the problem.

I told you that I believed the NRC had retaliated against me.

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[1]/ "Nuclear plant supervisor claims NRC harassment". Cape Cod Times, November 6, 1992.

Let me explain. During the efforts to resolve the water level problems at Millstone, I retained the services of Sol Levy, Inc.—a well known consultant in the field. In fact, Pilgrim also had retained the services of Sol Levy to help analyze its own water level problems. I retained the services of Sol Levy with the full knowledge and consent of my chain of supervision. During the modification process, the NRC sent a special team to Millstone, consisting of seven inspectors, who watched our every move. After the modifications were complete, the NRC issued a Level IV violation to NU because it engaged the services of Sol Levy without a signed vendor order. This was a violation of NU's internal procurement procedures. In a newspaper article, a high level NRC official specifically identified me as the individual responsible for the violation.[2] I firmly believe that the only reason this violation was issued is because I have been a visible and vigorous critic of the NRC and its policies.

After witnessing the termination of two NU whistleblowers almost two years ago, I attempted to negotiate with my employer in the hope of avoiding the same fate. From my experience, I was convinced that neither the NRC nor the Department of Labor ("DOL") would take any action in my behalf, should NU terminate me.

The recent NRC Office of Investigation (OI) report of my harassment confirmed that a minimum of three corporate Vice Presidents were involved. Federal Code of Regulations, 10 C.F.R. Part 2 provides specific examples of Severity Level 1 Violations

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[2]/ Ibid.

(Severity Level 1 being the most severe) whenever Corporate Officers are directly involved in violation of 10 C.F.R. §50.7. Despite these clear guidelines, the NRC only issued one Level 2 violation against Northeast Utilities. The $100,000 NU fine imposed on NU equates to less than $2 per average utility worker, assuming an annual salary of $40,000. This "Slap on the Wrist"[3] serves only to further encourage retaliation against individuals in my situation. I have provided my detailed thoughts on the effectiveness—or better, the lack of effectiveness-of this enforcement action directly to the NRC and also to Senator Lieberman.[4] This unconscionable failure to take appropriate enforcement action has in itself created a damaging "fall out" throughout NU that is so threatening to employees that it is quite unlikely that they will ever again report safety violations to the NRC! This smacks of the worst kind of intimidation imaginable in our free society.

But why is this intimidation of employees permitted to continue unchallenged by those empowered to oversee our nuclear industry? Why must honest, responsible employees who speak out about potential dangers in our system be stigmatized as "disgruntled employees" and forced out of their jobs and careers in disgrace? I believe the answer is quite simple. The industry and the NRC are putting economic interests of corporate giants ahead of

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[3]/ "Just a slap on the wrist" The Day, New London, CT. Editorial, May 1993.

[4]/ Letter from Paul M. Blanch to James Lieberman, NRC Director of Enforcement, dated June 4, 1993.

the safety interests of its citizens. In my twenty years of dealing with the AEC/NRC, I am firmly convinced that the NRC will not enforce any regulation or take any enforcement action that could negatively impact the economic viability of more than one nuclear plant or utility.

If existing NRC regulations were followed to the letter, I believe it may no longer be possible to operate many of the nuclear power plants in the United States. The Commission and many of the licensees are aware of this fact. As a result, any regulation that could impact upon the economic viability of one or more plants is conveniently and intentionally ignored. At the same time, less serious violations that pose no threat to the economic viability of plants are acted upon swiftly and severely by the NRC to dupe the general public by presenting an "Illusion of Action."[5] Far more grave issues, such as the use of "Motor Operated Valves," whose use clearly violates NRC Regulations, will continue to be "studied" until the plants are decommissioned.

It is clear, then, that the so-called "whistleblowers," while they be an embarrassment to their employers, are performing a vital service to our country. And yet, their record of treatment by employers, as I believe has been confirmed and documented by the Inspector General's Report, paints them as villains and turncoats. I understand there have been 609 cases of alleged harassment reported to the NRC and 609 careers destroyed. Of these 609 cases,

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5/ "NRC's 'illusion of action'" The Day, New London, CT by Paul Blanch dated September 20, 1992.

only 44 have been investigated by OI. Of these 44, only 14 have been decided in favor of the employee and only two cases—less than one-half of one percent—resulted in fines against a utility.

Such overwhelming odds against speaking out for the safety of our nation by those who are directly involved and qualified to speak out is placing our nation in grave danger of a nuclear disaster we all pray to avoid. If these statistics have the same impact and carry the same message for employees of other utilities as they do for employees of NU, I expect there are at least four individuals for every one who is willing to speak out. This means that rather than 609 cases reported by the Inspector General, there are likely more than 2,000 individuals with nuclear safety issues who will likely carry these issues to their graves.

Rather than supporting this censure, the NRC should welcome these individuals as allies in carrying out their oversight of this vital industry. But until that support is evident, until those who identify potential hazards and have the conviction to make them public are treated as responsible professionals and not traitors, the industry will continue to "cleanse" itself of its critics and go about its plodding response to crisis, shielded by its heavy handed repression from public scrutiny and accountability.

Because of my visibility on this issue, I have been contacted by many potential whistleblowers from NU and other licensees for counsel. Based on my own experience and that of others I know, I cannot in good conscience, encourage these individuals to take on a losing battle and subject themselves and their families to the

emotional and financial stress that is certain to follow from speaking up. Sadly, my advice to them is "Shut your mouth, collect your paycheck and pray that somehow the failures will be corrected before it's too late!" A recent editorial cartoon[6] accurately depicts the general perception of the treatment of whistleblowers at NU. I believe this perception is widespread throughout the industry. I would be cruel to suggest that anyone bring allegations of retaliation to either the NRC or the DOL. This attitude is accurately portrayed and I've seen the statistics. The cards are stacked against you. Unless you feel like gambling with your life and your family's security, your chances of beating the system are akin to playing Russian roulette with only two empty chambers in a weapon loaded with 607 live rounds. The most you can hope for is survival. At least with Russian roulette, there is a possibility the families will collect life insurance.

Even if the NRC decides to investigate these charges, there is only a two percent chance of a finding in favor of the employee. Only in two recorded cases did the findings result in a monetary fine against the utility and those amounted to nothing more than a "Slap on the Wrist." The system is on the side of the accused be it the utility or the NRC. The DOL process, for example, averages about 5 years at best—a very, very long time for the accuser to go without a paycheck. And, in the end, these actions result in these individuals being blackballed, discredited, subjected to background investigations, and, ultimately, being banned forever from the

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[6]/ The Hartford Courant, April 6, 1993

nuclear industry. What a price to pay for honesty and concern.

Mr. Selin recently testified[7] that in cases of licensee retaliation ". . . the first line of defense, . . . is the Department of Labor." While he would like us to believe that DOL defends whistleblowers, the facts clearly show it is the NRC that is defended by the DOL process.

Mr. Selin also argues that "due process" must be provided to the individuals accused of retaliating against whistleblowers. Due process is not an issue as it does not come into play for any other NRC enforcement action including placing plants on the "Problem Plant List." Why is harassment different? What "due process" was provided to the 609 whistleblowers and numerous concerned citizens over the past four years? By allowing the NRC to use the DOL as a "burial ground"[8] for its critics, the NRC rarely has to deal with the safety issue or take enforcement action against a corporate giant.

In my case, the Chairman of the NRC recently stated that "Blanch should be vice-president for engineering, Northeast Utilities" for my actions in identifying the Rosemount issue. Instead, I was conveniently "Cleansed" from the industry with the silent acquiescence of the NRC. In May of this year, I asked Mr. Selin if there were any positions available within the NRC. His response was that I should look in the Want Ads. This confirms my

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[7]/ Mr. Selin's Testimony before the House Subcommittee on Energy and the Environment, February 19, 1992.

[8]/ U.S. DOL Office of Inspector General report of Audit of the Office of Administrative Appeals dated May 19, 1993.

suspicions that the NRC opposes individuals critical of the industry as much as the licensees do.

Mr. Selin and I agree on one issue and that is the need for "Speak-out" or nuclear safety concern programs. With these programs, safety issues can be identified and in most cases resolved. The problem with these types of programs is that they are directed by the same management responsible for the retaliation and the same management with the incentive to keep the plants operating. In my situation, the retaliation in the form of an internal audit was actually initiated by the vice president responsible for NU's Nuclear Safety Concerns Program. The issue here is not the identification of safety concerns, but the retaliation which occurs after the issue is identified. There is no one to turn to and now we see the ineffectiveness of the NRC and the DOL, we are left with only one choice, and that is to kept quiet.

Mr. Chairman, let me offer this Subcommittee some additional suggestions to supplement those I provided earlier to the Subcommittee Staff[9] in a letter dated June 10, 1993, on what needs to be done to ensure an open and free exchange of information that can be vital to the safety of the nuclear industry and all of us.

In that letter we discussed possible legislative changes to require the NRC to investigate every allegation of retaliation and take "Prompt and Vigorous" enforcement action. Mr. Hadley also

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[9]/ Letter from Ernest Hadley, Esq. to Senator Lieberman dated June 10, 1993.

provided specific comments on legislative changes that would enhance individual protections for nuclear whistleblowers and begin to level the playing field in their battle against their employers. If employees are going to be left to fend for themselves without the assistance of the NRC, then at least give them the tools they desperately need to protect themselves and their families from financial ruin.

After personally observing the complete failure of the NRC to enforce any significant regulations, I am reluctant to advocate additional regulations or legislation. I greatly fear that new regulations or legislation will give the illusion of action to correct the problem. And, with that illusion complete, the NRC will go back to business as usual. But, I do support the legislative changes recommended by Mr. Hadley. By strengthening the remedies available to individuals, you can send a clear message to employees, the nuclear industry and the NRC that you truly value nuclear safety over industry profits.

But new regulation or legislation alone will not correct the problem. What we do need is a bold commitment within the executive branch that will transform the NRC from a nuclear lap dog to a nuclear watchdog. That commitment must come from the top down. We cannot tolerate an NRC chairman who thinks that things work just fine the way they are.

Mr. Chairman, I am a success story. I survived. I was not terminated. I was not financially ruined. I was not discredited. But, let me tell you in all honesty, no one should ever have to go

through what me and my family have been through over the last several years. I am now isolated by the industry that I have given my entire professional career to. There is virtually no chance that I will ever work in my chosen field again. If the system truly works as well as Mr. Selin will tell you later today, can he explain what has happened to me? And, what of the others who are not success stories?

We have an agency that conveniently looks the other way when utilities lash out to silence those who would question industry safety practices. This is not an opinion Mr. Chairman. The NRC's own Inspector General has produced many reports that confirm my contentions. We have seen reports, as I'm sure all of you have, documenting NRC's lies to Congress[10], reports documenting inappropriate entertainment of NRC personnel by licensees,[11] and Congressional Investigations[12] discussing the continued "Cozy Relationship" between the NRC and the Industry. I have every reason to believe we will see two additional IG Reports in the near future, one discussing the NRC's failure to take action with respect to the Rosemount debacle, and the other dealing with General Electric safety issues.

When Mr. Selin testifies, I am sure he will tell the Subcommittee, that, looking back, maybe his agency could have done

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[10]/ NRC's Inspector General report on Welding at Seabrook.

[11]/ NRC's Inspector General Report on NES cozy relationship with the NRC.

[12]/ House Subcommittee Investigation -- NRC cozy relationship with the Industry December 1987.

a better job. Now that they know the extent of the problem, he'll probably promise to do better in the future. Or maybe he will appoint another "Task Force" to study the problem. There has to be a better way to deal with these problems.

One NRC management representative recently told me[13] that he believed the only way to improve the system is to dismiss every NRC employee (including himself) and to start over with a whole new organization. Cosmetic changes, such as replacing the Chairman or a few of the Commissioners, he said, will only result in temporary changes. In time, he was certain that the NRC would again fall under its own bureaucratic weight to its existing dismal level of performance.

I cannot fully agree with this individual's assessment. I believe a wholesale change of the Commission and many of the top management positions, if replaced by individuals dedicated to protecting the public instead of the industry, could make this industry safe and economical for the country.

If the NRC truly wants to take action that will serve as a deterrent than it must bring individuals found violating 10 C.F.R. §50.7 to the Justice Department for possible criminal prosecution. This will ensure "due process" to all involved, although not the kind Mr. Selin has in mind. If the Justice Department finds the charges to be unfounded, then the licensees could be issued a credit against their annual fees. Until this is done, and until

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[13]/ Telephone conversation with Paul M. Blanch on or about July 7, 1993.

licensees realize the potential for severe penalties, I submit licensees will continue to "cleanse" individuals who are critical, because paying a $100,000.00 fine presents no real hardship and certainly makes better business sense than shutting down a plant—even for just one day.

Furthermore, utilities should be barred from using ratepayers' dollars to fund the harassment of whistleblowers or to defend company individuals criminally charged with harassment.

Let me make this final point. If the nuclear industry were half as effective in the disposal of radioactive waste as it is in the disposal of whistleblowers, our waste disposal problems would have been solved twenty years ago.

I thank you again for this opportunity to appear before the Subcommittee on Clean Air and Nuclear Regulation. Mr. Chairman, may I now respond to any questions from the Subcommittee?

---end---

Ernest C. Hadley
Attorney at Law

ADMITTED: MA, DC

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508-291-1354

June 10, 1993

The Honorable Joseph I. Lieberman
Senate Office Building, Room 502
Washington, DC 20510

Attention: Dan Berkowitz

Re: Comments of Paul Blanch and Ernest Hadley on Whistleblower protection

Dear Senator Lieberman:

At the request of your staff, I am providing comments from Paul Blanch, former Supervisor of Instrumentation in Control, Northeast Utilities, on the need for changes to the policies and regulations of the Nuclear Regulatory Commission regarding its treatment of so-called "whistleblowers" in the nuclear field. Mr. Blanch has directed his comments to his own personal experience with the NRC in his case, as well as drawing on the experience of others with whom he has been in contact. Although not specifically requested, I also am providing some comments of my own directed toward possible legislative initiatives the Congress could take which would improve the prospect of nuclear whistleblowers.

Since you are already familiar with the background of Mr. Blanch, I have taken the liberty of not including that information in this letter. However, later in this letter, prior to providing you with my own comments, I will also provide you with some information on my background.

COMMENTS OF PAUL BLANCH

Earlier this year, members of your staff requested I provide my suggestions to your office with respect to the NRC's present policies and regulations dealing with nuclear whistleblowers. My initial reaction was that I have provided my comments and suggestions to the NRC's Office of Inspector General. It was my belief that this issue and some recommendations would be provided as part of the upcoming IG report on the generic whistleblower issues.

After discussing this matter with the Inspector General's Office, I understand that my suggestions for reform will not be included as part of this report. I am therefore providing my present understanding of the process and suggestions for possible improvement. I am well aware that whatever changes are made to the Regulations or to NRC/DOL procedures, a balance must be maintained, such that valid claimants are protected and frivolous claims can be promptly dismissed.

To provide an overview of the present process, an employee of a licensee is directed to either 10 C.F.R. 30.7 or 50.7 depending upon the type of licensee. According to these regulations, an employee believing he or she is the recipient of retaliation for engaging in protected activities, ". . . **may** seek a remedy for the discharge or discrimination through an administrative proceeding in the Department of Labor." If this course is taken, then the employee has 30 days to file a complaint with the DOL. (This provision has recently been changed to 180 days.)

In my particular situation, there was no discharge or adverse employment action, but yet, I was still directed by the NRC to file with the DOL. In fact, I was informed that this is the only path to resolution and the inference was that the NRC would take no action unless I filed with the DOL. My DOL complaint, typical of numerous others, was investigated and the DOL found that I was engaged in protected activities and that I was the recipient of Harassment, Intimidation, and Discrimination (HI&D).

Within two days of the DOL decision, the attorneys for NU appealed the DOL finding to an Administrative Law Judge (ALD). I then received a Notice of Deposition from the NU attorneys and was forced to seek legal counsel at a personal cost approaching $2,000.00 per day. The NU attorneys informed me that the deposition would last at least 3 days and there would be hearings before an ALJ and possible appeals, etc. I then contacted the NRC for legal assistance and was informed that they would not be involved in any matters with the DOL or the ALJ.

My attorney, Igor Sikorsky, estimated that my legal cost could exceed $50,000.00 to defend my position and that he had been approached by the NU attorneys to discuss a possible Settlement Agreement and a withdrawal of my DOL complaint. Due to the fact that I could not afford $50,000.00, I was forced to withdraw my complaint under duress and sign a Settlement Agreement written by the NU contract attorneys. To me this is nothing but a legal form of blackmail and further harassment by NU and its powerful Washington attorneys. Of course, all of NU legal fees are paid by the ratepayers.

After signing this agreement, I pointed out the shortcomings of the entire process to Mr. William Russell, Region 1 Administrator, in a letter dated February 1990. I pleaded with various Region

personnel to respond to the issues raised in this letter, and to this day, the NRC has not had the courtesy to respond to my concerns.

My situation is neither unique nor an example of the worst abuse of this process. Another example is Linda Mitchell, an ex-engineer at the Palo Verde plants in Arizona. Ms. Mitchell raised safety concerns and reported them to the NRC. She was informed to file with DOL. She then received a decision from the DOL supporting her allegations and Arizona Public Service (APS) appealed the decision to an ALJ. Unlike myself, Linda remortgaged her home to defend her case against the unlimited resources of APS. After a protracted legal battle, and personal expenses exceeding $100,000.00 Linda prevailed. The ALJ decision was sent to the Secretary of Labor for her approval. After four years, the Secretary of Labor has not approved the final case. Due to the personal pressure and further harassment, Linda was forced to accept a settlement agreement and like every other nuclear whistleblower, is no longer employed in the nuclear field.

This is the first shortcoming of the NRC Policies, in that, if there is no adverse employment action, the NRC should investigate this alleged violation of their regulations and come to some decision within a reasonable time such as 90 days. If the NRC finds that discrimination did occur for engaging in protected activities, "prompt and vigorous" enforcement action should take place within 90 days.

I am fully aware of the burden this will impose on the NRC, but this is the only Federal agency qualified to investigate violations of NRC Regulations. These investigations could be conducted by either local NRC Resident Inspectors or by the understaffed Office of Investigations. It is recognized that the NRC would need to provide training for these investigators, but certainly, there is a greater understanding of NRC Regulations by NRC employees, than by DOL employees. Implementing this type of policy would eliminate greater than 50% the claims of discrimination and would avoid the protracted litigation and legal expenses incurred with the present process.

If this policy had been in effect and an objective investigation conducted by the NRC, every case I am aware of would have been resolved without the termination or "buy-out" of these employees. Some off the cases I am familiar with are obviously, my own, Arnold Gundersen, Donald Del Core, Timothy O'Sullivan all of Connecticut, Linda Mitchell and Sarah Thomas of Arizona Public Service, and Ann Harris of TVA. Further, the enormous expense to the individuals, utilities, ratepayers and the Federal government would have been avoided.

If it is determined that discrimination did occur, the enforcement action as specified in 10 C.F.R. Part 2, Appendix C must be

consistently applied. Unless timely and appropriate enforcement action is imposed, the harassment and suppression of individuals will continue.

COMMENTS OF ERNEST HADLEY

By way of introduction, I am an attorney in private practice, who is a member of the bars of the Commonwealth of Massachusetts and the District of Columbia. My practice is concentrated on representing federal employees. I have represented a number of federal whistleblowers. Also, I have written extensively in the field of federal employment law. I have, on numerous occasion, represented whistleblowers in the nuclear industry. I serve as legal counsel to We the People, Inc. of the United States-a safety advocacy group, which monitors nuclear safety and provides assistance to nuclear whistleblowers.

From a legal perspective, there are two substantial problems in representing nuclear whistleblowers. The first problem relates to the mismatch in resources between the often terminated employee and the utility, which has the backing of stockholders and ratepayers. The second relates to fulfilling the burden of proof imposed upon employees who contend they had suffered an adverse employment action for making protective disclosures.

As I am sure you are aware, recently Congress enacted the Whistleblower Protection Act of 1989 (P.L. 101-12), which enhanced the protection provided to employees of the federal government who suffer retaliation as a result of making protective disclosures about waste, abuse and mismanagement within their agencies. I believe that your Committee should review this legislation and strongly consider making several of the procedural and substantive provisions of the WPA applicable to cases under the Energy Reorganization Act.

Of particular significance, 5 U.S.C. §1221 provides a procedure through which employees who believe they have been subject to retaliation for whistleblowing can seek a stay of the adverse personnel actions through the Merit Systems Protection Board. Pursuant to the Regulations of the MSPB at 5 C.F.R. §1209.10, the Board is required to consider whether there is a substantial likelihood that the employee will prevail on the merits of his or her claim and whether the stay would result in some extreme hardship to the employing agency.

Granting either the Department of Labor or the Nuclear Regulatory Commission the authority to issue stays of adverse personnel actions would go a long way toward leveling the playing field between employees and utilities. While employees still will not be able to match the resources of utilities in any ensuing legal battle, at least the employee who has shown a strong likelihood

that the employment action is based on retaliation would continue to have some means of financial support while pursuing action against the utility. Also, I believe the authority to grant stays of adverse personnel actions would encourage utilities to consider alternative methods to resolving the dispute at an earlier stage of litigation and would result in fairer resolutions to employees. The authority to grant a stay would not in anyway diminish the rights of the employer. The employer would have a fair opportunity to demonstrate either that there is not a substantial likelihood that the employee will prevail, or that granting a stay would impose an extreme hardship on the employer. Also, the issuance of a stay does not prejudice the rights of the employer to prevail on the ultimate merits of the case when it goes to hearing.

The WPA also altered the burden of proof placed upon an employee in a retaliation for whistleblowing case. Under the WPA, a federal employee is no longer required to show that retaliation was a substantial or motivating factor in the adverse employment action. The employee only must show that reprisal was a "contributing factor." 5 U.S.C. §1221(e). Congress specifically lowered the burden of proof after conducting hearings on the difficulties in meeting the former burden of proof. Congress concluded that the burden of proof was so difficult that it was nearly impossible for the employee to fulfill. Congress also concluded that the employing agency should not escape liability if the employee showed that whistleblowing was a contributing factor to the personnel action unless it could present clear and convincing evidence that it would have taken the same personnel action even in the absence of retaliation. Id.

A further provision that was part of the WPA also would be a benefit to nuclear whistleblowers. An amendment to 5 U.S.C. §7701 now provides for interim relief for employees who prevail in the initial stages of the appeal of an adverse action. Under the provision, unless the presiding judge determines that interim relief is not appropriate, the employee is required to be returned to his former employment pending the outcome of any appeals. The employing agency has the authority to make a determination that the return of the employee would be "unduly disruptive" to the work force. However, if such a determination is made and the employee is not returned to his or her former job, the employing agency must still provide the employee with full pay and benefits during the pendency of any appeal.

Providing for interim relief for employees who are successful in the initial stages of challenging an adverse employment action would address many of the concerns raised by Mr. Blanch in his comments. Again, I believe that such a provision also would encourage employers to consider earlier and fairer resolutions to disputes. I hope that you will consider these legislative changes.

In the final analysis, such changes are not simply protection for workers. They are further assurances that the public health and safety will be protected.

Very truly yours,

Ernest C. Hadley

cc: P. Blanch

June 4, 1993

Docket No. 50-423
File No. RI-89-A-0133

Mr. James Lieberman
Director, Office of Enforcement
United States Nuclear Regulatory Commission
Washington, D. C. 20555-0001

Dear Mr. Lieberman:

Subject: Notice of Violation and Proposed Imposition of Civil Penalty and Demand for Information

On May 25, 1993, I was personally advised by an attorney, representing Northeast Utilities and directly responsible for the wording of my Settlement Agreement, that any objections made to the NRC related to the lack of enforcement action may violate my Settlement Agreement. This statement was made in the presence of a witness, and if this is in fact a true statement, then the Agreement itself may be in violation of 10 CFR 50.7 (f).

I have received a letter from Mr. Roy Fuhrmeister dated May 4, 1993 with the enclosed proposed enforcement action against my previous employer, Northeast Utilities. In Mr. Fuhrmeister's letter it was clearly stated that I had alleged harassment, intimidation and discrimination (HI&D). It was also stated that I alleged that NU destroyed or modified documents in order to conceal legitimate safety issues. I am in total agreement with the fact that alleged documents were not destroyed as I personally informed the Office of Investigations of their discovery.

While this letter provided a very broad overview of my accusations there are many specifics which were not addressed in the proposed enforcement action or in the letter. One of the most extreme allegations was that the Vice President of Nuclear and Environmental Engineering with the full knowledge and consent of the President of NU initiated the internal audit in a manner which not only was inconsistent with NU practices, but also intentionally violated NU's Nuclear Safety Concerns Procedures. This same Vice President was responsible for the NU Nuclear Safety Concerns Program. This action was alluded to in the Office of Investigation Synopsis but not addressed in the enforcement action.

I also alleged that as a direct result of the internal audit, initiated for vindictive purposes, two of my subordinates were suspended as a form of HI&D. Further, I clearly believed that these suspensions were directed by an **NU Corporate Officer above the position of Senior Vice President of NE&O.** Again, this was only briefly discussed in the OI Synopsis but neglected in the actual enforcement action.

I also contended that Rosemount Inc., motivated by the fact that they intentionally withheld vital safety related information from the industry and the NRC for many years, directly influenced NU's actions.

As a private citizen and the recipient of this intentional retaliation from Northeast Utilities and Rosemount I was subjected to HI&D and believe I have the right to request a response to the following specific questions.

1. If the Office of Investigation concluded that **three NU Corporate Officers** were "...those responsible,...either directly or indirectly...(and that I)...was the victim of various incidents of HI&D and attempted HI&D as a result of (my) stand on the issue." If this is the conclusion of the Office of Investigation, what action is being proposed for these violations of 10 CFR 50.7?

2. Mr. Fox, President and Mr. Opeka, Executive Vice President, were directly involved in the initiation of the internal audit as a direct form of retaliation for my engagement in protected activities. During October 1989, I personally met with Mr. Fox and he assured me that the audit was initiated and would be conducted in accordance with NU Policies and Procedures. OI determined the Internal Audit was not conducted in accordance with NU Policies and Procedures. These same individuals are now responsible for five operating nuclear power plants. What assurance can NU employees, the general public and the NRC have that this type of action will not continue?

3. NU Vice President C. Frederick Sears was directly involved in the initiation of the internal audit and his actions were inconsistent with NU's Procedures and Policies. What enforcement action has been taken with respect to this particular individual for his failure to follow procedures in an apparent effort to harass me?

4. Was the final decision to suspend two of my subordinates made by an NU Corporate Officer? If so, who is this individual and what specific enforcement action has been taken against this individual?

5. According to the proposed enforcement action, NU attorney, Mr. Ed Richters and NU Manager, Thomas Shaffer , acting on behalf of NU Corporate Management, threatened individuals with letters of reprimand if they did not talk with NU contract attorneys prior to being interviewed by the Office of Investigation. These individuals, Harry Scully and Gilbert Olsen, were about to "Testify in a Commission proceeding" which is defined as a protected activity by 10 CFR 50.7. What action is proposed against these individuals or are attorneys exempt from violations due to their position, even if directed by Corporate Management? Mr. Richters is the NU Attorney responsible for conducting NU employee training related to NRC Employee Protection (10 CFR 50.7).

6. I was informed by representatives of the Office of Investigation that no action could be taken as a result of the suspension of my two subordinates because they were not involved in protected activities. Does the NRC consider retaliation against subordinates and possibly family members fair targets as long as there is no direct retaliation against the individual involved in the protected activities?

7. In early 1990 I requested the Director of Nuclear Safety Concerns, Mr. Peter Santoro, investigate the validity and circumstances surrounding the internal audit. I alleged to the NRC Office of Investigations that Mr. Santoro's response was false and directed by either Corporate Management or by contract attorneys under the direction of Corporate Management. I contended this was yet another form of discrimination and violated the intent of the Nuclear Safety Concerns Procedure. Did the Office of Investigation look into this matter and what were their findings?

8. I specifically alleged that Rosemount Inc. influenced NU's actions in an effort to disguise the fact that they had failed to report a defect as required by 10 CFR Part 21. Has the NRC developed any conclusions with respect to Rosemount's

involvement in the actions taken by NU against me and what enforcement action is being taken against Rosemount for their direct involvement in this HI&D?

9. My initial allegation of HI&D was made to the NRC on **April 4, 1989** and the NRC finally issued a Notice of Violation 49 months later on **May 4, 1993.** Does the NRC consider this "prompt and vigorous enforcement action"[1] which will serve as a deterrent and a clear message to other licensees that HI&D will not be tolerated?

10. 10 CFR Part 2, App. C, Supplement VII provides specific examples of Severity Level I Violations. Paragraph 4. states "Action by senior corporate management in violation of 10 CFR 50.7 or similar regulations against an employee;" Did the NRC conclude that two Vice Presidents and one Senior Vice President were not "senior corporate management" or was their action not considered a violation of 10 CFR 50.7? My reading of this would indicate a minimum of three Severity Level I Violations.

11. The NRC is proposing a civil penalty of $100,000 for NU's HI&D. Given the fact that this amounts to less than 5 cents for every $1000 of income, equates to fining me $3.90, an amount which is less than a local parking ticket. Is this amount considered vigorous enforcement action and deterrent to prevent future action against employees complying with NRC Regulations by informing management of safety concerns?

12. As a taxpayer I am very concerned about the cost of this and similar investigations. With other NRC inspections, the licensee is liable the entire cost. What was the cost of this three year investigation and is Northeast Utilities responsible for these costs?

13. The Manager of Internal Auditing, responsible for conducting the audit of my group, was found by the Office of Investigations to be using falsified credentials, coming to invalid conclusions based on invalid documentation. As this Manager of Internal Auditing clearly followed management direction and was aware the audit was retaliatory and in violation of 10 CFR 50.7 what enforcement action is being proposed against this individual or his direct management?

14. The internal audit and the suspensions resulting from the audit, were protested to both a grievance panel and an appeal panel. The appeal panel reported directly to the President of NU, Mr. Bernard Fox. These reviews concluded that the audit of myself and my subordinates, and the actions taken against my two employees was inconsistent with NU Policies and Practices. I consider this just one more example of HI&D by a minimum of six Vice Presidents and the President of NU. What enforcement action is being proposed for these actions?

15. The terminations of Donald Del Core and Tim O'Sullivan in November 1991 are another example of the NRC's refusal to take timely enforcement action. The DOL determined that these individuals were participating in protected activities, were terminated as a direct result of these activities, and terminated in a manner inconsistent with NU past practices, policies and procedures. The terminations were directed by an NU Corporate Officer which is yet another Severity Level I

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[1] 10 CFR 2 Appendix C- General Statement of Policy and Procedures for NRC enforcement Actions

Violation. Why has it taken over 18 months to investigate these clear violations or do these individuals have to wait over four years as in my case?

This proposed enforcement action, and no action in the Del Core and O'Sullivan cases, has created yet another "chilling effect" in that Corporate Officers can not only direct retaliation but actively participate in the retaliation and not ever receive any Violations. The "chilling effect" created by this NRC inaction is a safety concern in that few if any safety issues will ever be raised by NU employees. Had I been aware of the NRC's reluctance to take any meaningful action against those individuals directly responsible for this travesty, I never would have raised either the Rosemount transmitter issue or the level problems on the BWR's.

The employees at Northeast Utilities are aware that HI&D occurred and continues to occur and that it took over four years for any enforcement action to take place. Many of the individuals following the direction of the top management are either retired or transferred, and those most responsible for these actions and the contract attorneys continue with nothing more than a "slap on the wrist." The message is very clear that when necessary, top management of NU will continue to retaliate against those individuals and there will be no action against them other than a little embarrassment in the media.

I note that the Chairman of the NRC has stated that most whistleblowers are disgruntled or hold a grudge. It is obvious that the entire NRC is singing in tune with the Chairman's lyrics. The 49 month delay in this enforcement action, and what can only be described as a "token" fine are clearly designed to protect NU and only creating the "Illusion of Action" for the general public. I regret I have ruined my career and become a whistleblower while the NRC continues its cozy relationship with the industry.

Your response to the above direct questions would be greatly appreciated in a reasonable time frame. The normal requirement for a licensee response is 30 days and I do not consider this to be an unreasonable request for an NRC response. I appreciate your prompt attention to this matter.

Sincerely,

Paul M. Blanch

Paul M. Blanch
135 Hyde Rd.
West Hartford Ct. 06117

cc: Senator Lieberman
Chairman Selin
Mr. Ben Hayes
Mr. David Williams
Mr. William Raymond
Atty. Ernest Hadley

TESTIMONY OF ALLEN LEE MOSBAUGH, NUCLEAR ENGINEER AND
THE FORMER ASSISTANT PLANT SUPPORT MANAGER FOR
PLANT VOGTLE NUCLEAR POWER STATION

BEFORE THE U.S. SENATE COMMITTEE ON
THE ENVIRONMENT AND PUBLIC WORKS, SUBCOMMITTEE ON
CLEAN AIR AND NUCLEAR REGULATION

AT A HEARING TO CONSIDER THE NRC'S
HANDLING OF INTIMIDATION AND HARASSMENT ALLEGATIONS
BY EMPLOYEES WITHIN THE NUCLEAR INDUSTRY

JULY 15, 1993

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TESTIMONY OF ALLEN L. MOSBAUGH

My name is Allen L. Mosbaugh. If anyone told me a few years ago that I would be before a Subcommittee of the United States Senate to discuss "whistleblowing" in the nuclear industry, I would have told them they were crazy.

I am an advocate of nuclear power and I chose to devote my professional career to nuclear power. Before I entered the nuclear industry I obtained an undergraduate engineering degree and a Masters degree in Chemical and Nuclear Engineering from the University of Cincinnati. I went on to complete my course work towards a doctorate in Nuclear Engineering, and at that point I obtained a job with the Babcock & Wilcox Company to help with the start-up and operation of three nuclear plants. I then joined Cincinnati Gas & Electric, who actively solicited my help managing the start-up of a nuclear plant that was then under construction. I remained with CG&E for six years, until the Georgia Power Company ("GPC") made me an offer to come work for them. I was hired on as an Engineering Superintendent at GPC's Vogtle Electric Generating Plant ("Plant Vogtle) in 1984, and initially had some 60 engineers reporting to me. All of my annual performance reviews

uniformly state that my performance was superior.[1/] Moreover, management continued to promote me and at the point in time I blew the whistle I was serving as the Acting Assistant General Manager of Plant Support -- the second highest level manager of management at the plant site with managerial responsibility for over 350 employees from such departments as engineering, quality control, security and training.

A primary event leading to my becoming a "whistleblower" was the Southern Company's decision to create a Southern Nuclear Operating Company ("SONOPCO"). GPC is a wholly owned subsidiary of The Southern Company, along with Alabama Power Company (APC). Between APC and GPC, The Southern Company controls six nuclear units (two at Plant Vogtle, two at Plant Hatch and two at Plant Farley). When SONOPCO was created to manage all six units, an entirely new line of corporate management was installed above the plant general manager to the executive vice president.

1/ GPC's first annual performance review rated my work performance as "Excellent," and I was told that my growth possibilities with the company were "Unlimited." My last annual performance review, which I received in February of 1990, acknowledged that my overall managerial goals were "exceeded by a wide margin."

Prior to the realignment of GPC's nuclear management, I found my prior managers to be dedicated, principled, and ethical individuals. This was no longer the case. It appeared to me that the new SONOPCO management was pressing site managers to take risks. I further began to detect an atmosphere of deceit and deception. Eventually, I concluded that this new management, if they felt they could get away with it, would knowingly make false statements to the NRC and knowingly violate safety procedures.[2/]

I initially contacted the NRC in January of 1990, after I concluded that a Plant Vogtle manager had intentionally violated a Technical Specification, specifically Technical Specification 3.4.1.4.2, which prohibited the release of water into the reactor through dilution valves while the

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[2/] Nuclear managers are well aware that the intentional violation of safety requirements is criminal and I was greatly disturbed that my management would engage in criminal misconduct. In this respect, Congress and the NRC determined that "willful violation" of a safety requirement as well as the "willful" submission of materially false safety-related information to the NRC constitutes a criminal felony. Such criminal conduct subjects the licensee and/or individual wrongdoers to potential civil and criminal penalties, including license revocation, and felony conviction with penalties of 10 years imprisonment and $10,000 fine for conspiracy, and 5 years and $5,000 for individual "willful" acts. See 42 U.S.C. §2272; 42 U.S.C. 2273(a); 42 U.S.C. §2131; and 18 U.S.C. §1001.

plant was at "mid-loop."[3/] In this respect, Technical Specification 3.4.1.4.2 required that the dilution valves be kept locked closed when the plant was at mid-loop. I eventually concluded that operations management at Plant Vogtle had intentionally violated Technical Specification 3.4.1.4.2 by opening the dilution valves while the plant was at mid-loop. The valves were opened so unborated water could be added to the reactor coolant system. By adding unborated water while the plant was at mid-loop, the total concentration of boron surrounding the reactor was diluted. Boron is necessary to retard the fission process and, if the concentration of Boron was sufficiently diluted, the reactor would go critical. Because the rods are fully inserted while when the reactor is at "mid-loop," the criticality could not be controlled by lowering the rods. Risking an inadvertent criticality is unconscionable conduct on the part of a nuclear licensee.

In January of 1990, I alerted the Nuclear Regulatory Commission about my concern that management had risked an inadvertent criticality by intentionally opening the dilution valves in violation of technical

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[3/] The term "mid-loop" relates to the status of the reactor, where : 1) the control rods are fully inserted into the core; and 2) approximately two thirds of the solution surrounding the reactor is drained. Normally, a plant goes to "mid-loop" during a refueling outage.

specifications. At the time I sent this allegation, my general impression of the NRC's past handling of whistleblowers made me fear that my identity might be leaked to the utility and that the utility might take adverse action against me. This caused me to conceal my identity from the NRC. I only identified myself as "a concerned employee." A copy of this "Concerned employee" memorandum is attached as Attachment 1.

Moreover, I wore gloves when handling the document so my finger prints would not be found, and I drove to a distant post office so the postmark would not point to me. I was afraid that my identity could be leaked back to GPC.

NRC's Office of Investigations (NRC-OI) conducted an on-site investigation of my allegations. The final report concluded that management had intentionally violated technical specification and had intentionally opened the dilution valves.

Management's response to the NRC-OI investigation only increased my concern that my management had no intent to reform and would continue to risk the safe operation of Plant Vogtle by engaging in intentional wrongdoing. In order to prove an intentional or willful violation of a Technical specification or a safety standard, I understood

that I needed proof that those committing such violations in fact knew that they were violating federal regulations. I realized that the only reasonable method available to accurately document evidence of such open displays of willful management misconduct was to use a tape recorder. To fully document this concern I decided it would be necessary to secretly record the statements being made in my presence. However, before I recorded a single conversations, I went to great lengths to determine that my tape recordings would be legal and would not violate any GPC work rule or regulation.

The factors prompting me to record information concerning my safety concerns are as follows: First, I concluded that it was my duty as an American citizen to document criminal wrongdoing occurring at a nuclear power station. Second, I researched every written work rule, regulation and policy published by GPC and determined for my self that tape recording was not prohibited. Third, I reviewed a legal memorandum previously prepared by GPC's own attorneys. A copy of this memorandum is attached as Attachment 2. This legal memorandum advised Plant Vogtle management that it was perfectly legal to engage in one-party tape recording and justified the installation of tape recorders

on managers telephones so they could record any particular phone conversation they wanted to without being detected by the other participants to the conversation.[4/]

[4/] It is well settled under federal and Georgia state law that individuals have no legitimate expectation of privacy that a party to a conversation will not record it. U.S. v. Hodge, 539 F.2d 898, 905 (6th Cir 1976); Accord., Ansley v. Stynchcombe, 480 F.2d 437, 441 (5th Cir. 1973). As a matter of law, GPC and its employees had no "legitimate expectation" that Mr. Mosbaugh would not document (through tape recording) conversation to which he was a party or that he would not turn these recordings over to the NRC or other governmental agency:

> an individual has no legitimate expectation that the person to whom he is speaking will not relate the conversation to the legal authorities. That rule applies with equal force to the recording of a conversation as to the repetition of one.

U.S. v. Salisbury, 662 F.2d 738, 740 (11th Cir. 1981) (citation omitted).

Under Georgia state law there is likewise absolutely no "legitimate expectation" that an employee would not engage in one-party tape recording at Plant Vogtle. Humphrey v. State, 204 S.E.2d 603, 609 (Ga. 1974); accord Mitchell v. State, 235 S.E. 2d 509, 511 (Ga. 1977) (there is "no right of privacy" and "either party to a conversation may record the conversation and publish it"). Indeed, the Georgia Supreme Court has upheld the legality of one-party taping and explicitly ruled that this practice does not violate the Georgia Invasion of Privacy Act, the Georgia State Constitution, the U.S. Constitution or the OCCSSA. Green v. State, 299 S.E. 2d 544, 546 (Ga. 1983). Even in states which prohibit one-party taping that legal prohibition cannot act to stop federal officials from using the tapes. See, e.g., U.S. v. Adams, 694 F.2d 200, 201 (9th Cir. 1982) (citation omitted) (There is a "clear and simple rule that evidence obtained from a consensual wiretap...is admissible in federal court proceedings without regard to state law.").

(continued...)

I also had extensive knowledge of one party taping that Georgia Power conducted throughout the plant as well of knowledge that all incoming calls were subject to taping (at my labor case hearing GPC admitted that many of the calls were taped without either party knowing they were being recorded. Because neither party was aware of the taping, GPC actually violated the federal wiretap statute). I was also fully aware that all radio communications at the plant were continuously tape recorded.

I believed my tape recording was a necessity to gather credible evidence of intentional wrongdoing. In this respect, taping provided the only method to accurately document what was occurring. Eventually, even the NRC sanctioned the use of recording conversations to collect evidence. Two weeks before I told the NRC about the existence of my tapes I was asked by the NRC if I would consider wearing a wire for the NRC.

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[4] (...continued)
Accord., Ansley v. Stynchcombe, 480 F.2d 437, 441 (5th Cir. 1973).

Federal courts have universally recognized the "intent" of Congress to "allow consensual interception" of conversation. U.S. v. Hodge, 539 F.2d 898, 904 (6th Cir 1976).

I made sure that my tape recording activity did not cause the slightest disruption to the daily working atmosphere at the plant site. All of my recording activity was kept strictly confidential. Finally, I used the tapes for one purpose only -- to document criminal wrongdoing. I drafted detailed summaries of allegations (based on the contents of the tapes) which I turned over to the NRC for investigation. Attachment 3 consists of two memos I confidentially provided to the NRC in June 1990 and Attachment 4 is a copy of a confidential memo prepared for the NRC summarizing GPC's false statements related to the Diesel Generator allegations.

I never attempted to use the tapes to embarrass GPC in the press; I did not use them to threaten anyone, blackmail anyone, or to obtain a "buy-out" from anyone. In fact, at no time did I use them for personal gain. Rather, the only use I ever made of the tapes was to provide the NRC first with written allegations setting out the evidence I had recorded, and then to provide them directly to the NRC.

Based on the above, commencing in February of 1990 I began using a $39 pocket tape recorder to document events occurring at the plant site between February and September of 1990. On March 20, 1990, Plant

Vogtle had a major accident so severe that a Site Area Emergency had to be declared. After the accident, I was able to record evidence demonstrating that management had engaged in a criminal conspiracy to conceal safety-related information pertaining to the Site Area Emergency and intentionally submitted materially false statements to the NRC with respect to the Site Area Emergency.

The Site Area Emergency occurred, when a minor truck accident at the Plant Vogtle site resulted in the loss of all on and off site electrical power and the back-up diesel generator failed to start. Once electrical power was lost, the reactor core temperature began to rise and a "melt down" would eventually follow unless electrical power was restored to the safety systems. When plant operators switched on the plant's back-up diesel generator it failed to run and a "Site Area Emergency" was declared. Thank God that the back-up diesel generator did eventually run and a serious accident was averted. After the accident, GPC was prohibited from re-starting the reactor until it could demonstrate to the NRC that all necessary corrective action leading to the emergency had been taken and that all margins of safety could be met.

GPC was required to state to the NRC, orally and in writing, that tests of the diesel generator demonstrated that it was reliable. When I learned of GPC's assertions I immediately suspected that management may have intentionally over-stated the reliability of the diesel generator in order to expedite the re-start of the reactor. Moreover, in response to the Site Area Emergency, I overheard a statement made during a Plant Vogtle staff meeting which I interpreted as a directive from management to relax adherence to technical safety requirements when strict adherence would delay the scheduled re-starting of the reactor. These events caused me to increase the scope of the conversations I tape recorded.

By early May of 1990, I had recorded evidence which I believe demonstrates that the highest levels of my management intentionally made false statements to the NRC regarding the reliability of the diesel generator.[5/]

[5/] I recorded statements made by the Plant Vogtle Project Vice President, Ken McCoy, and GPC's Senior Vice President, George Hairston (and others) demonstrating that they were aware that prior statements related to the reliability of the diesel generators were materially false and that they intentionally reiterated these same false statements when filing the Licensing Event Report ("LER") to the Commission 30 days after the Site Area Emergency had occurred.

At this point I initiated contact with a lawyer to help guide me through a difficult course. I did not feel comfortable revealing the recorded evidence to the NRC because I knew that GPC had a close relationship with NRC Staff and the fact that I was recording would end up being leaked to GPC. Indeed, up until GPC learned of my tape recording I continued to gather additional significant evidence related to the submission and cover-up of GPC's transmittal of false information to the NRC.

On June 13, 1990 I was granted formal "confidential alleger" status by the NRC. Soon thereafter I proceeded to advise an NRC-OI investigator, Larry Robinson, that I had first-hand knowledge that GPC's highest levels of management willfully submit material false information to the NRC about the reliability of the diesel generator following the Site Area Emergency.

After I was terminated, I was told by NRC-OI personnel that, given the nature of my allegations, my tape recorded evidence was indispensable and in their opinion my tape recordings constituted "protected activity".

For whatever reasons, NRC Staff has completely failed to aide me. For example, NRC Staff refused to allow Mr. Larry Robinson, the NRC-OI investigator handling my allegations, to testify at my labor case, claiming that his testimony could compromise the integrity of NRC-OI's investigation. When my lawyers eventually subpoenaed Mr. Robinson, NRC counsel moved to quash the subpoena, and the administrative law judge granted NRC's request. See attachment 5, the NRC motion to quash the Subpoena of Larry Robinson. The fact remains that my lawyers submitted a list of every question they intended to ask Mr. Robinson and agreed to limit their scope of questioning to ensure that Mr. Robinson's testimony would not compromise the NRC-OI investigation. NRC Staff was indifferent to my needs and denied me access to the testimony of Mr. Robinson, who had advised me of his personal willingness to testify.

The Subcommittee has requested that I comment on the"timely manner" in which the NRC resolves allegation. In my case, the long delay in NRC action seriously prejudiced my case. My Department of Labor Whistleblower claim went to trial in March, 1992. By that time the NRC was in possession of all my tapes and safety concerns for over a

year and a half. At my trial, the NRC requested that I not testify about any matter contained in approximately 76 tapes being used by the NRC. Likewise, the tapes I made could not be introduced as trial evidence because of the concern that their disclosure would compromise the OI investigation.

Thus I was unable to use the tapes and the incidents they documented to demonstrate to the Department of Labor that the recording I did was reasonable. If the NRC had acted upon my concerns in a timely fashion and completed a thorough investigation, I would have been able to use the tapes and the allegations they document to prove the necessity of recording various conversations. Additionally, NRC Staff would not have had grounds to object to the testimony of my main corroborating witness, Larry Robinson.

It is very troublesome that he NRC would obtain taped documentation from an employee whistleblower containing allegations of criminal misconduct and fail to complete its investigation of these allegations for over three years. In fact it was not until last month that OI finally began to conduct interviews of the GPC corporate officials implicated in the

criminal activity surrounding the submission of false information to the NRC back in April of 1990.

My experience as a whistleblower, particularly in the nuclear industry, has alerted me to the current reality that the NRC Staff is unwilling to protect individuals who take it upon themselves to document evidence of willful wrongdoing on the part of nuclear managers.

The fact is that the NRC demands that employees be absolutely free to document regulatory concerns:

> to effectively fulfill its mandate, [NRC] requires complete, factual and current information concerning the regulated activities of its licensees. Employees are an important source of such information and should be encouraged to come forth with any items of potential significance to safety without fear of retribution from their employers

47 Fed. Reg. 30,452-01 (1982).

More importantly, the courts and Congress, when enacting the OCCSSA recognized that one-party taping was an important right implicating First Amendment protection. Courts have been concerned with the potential "chilling" effect certain language contained in the OCCSSA had on the First Amendment right to engage in one party tape recording

and held that certain prohibitions on one party recording was an unconstitutional infringement upon the press.[6/]

NRC Staff's inaction and failure to come to a whistleblower's aide who responsibly and reasonably documented criminal wrongdoing on the part of management is inconsistent with whistleblower's right to gather evidence and report wrongdoing. The record demonstrates that I chose the only reasonable method available to document my allegations and I took great care to comply with all applicable laws and all GPC rules and regulations, and nothing even hints or suggests that tape recording evidence of criminal wrongdoing is in any way prohibited. To the contrary, my tape recording was consistent with the nature and type

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[6/] In Boddie v. ABC, Inc., 881 F.2d 267, 270-271 (6th Cir. 1979), the Court stated:

> At first glance, this case may not appear to be about freedom of expression...[However] since the wiretap statute has a 'potentially inhibiting effect' on the press' constitutionally protected reportorial functions, the vagueness test applies 'with particular force."

Similarly, in Chase v. Buscombe County, N.C. Dept. of Community Improvement, Case No. 85-SWD-4, D&O of SOL (Nov. 3, 1986), the Secretary of labor held that the purpose of the whistleblower protection provisions was to "encourage the reporting of violations" and the Secretary explicitly warned against sanctioning employer practices that may have a "chilling effect" on employee reportorial rights. Id., at p. 4 (emphasis added).

of one-party tape recordings GPC routinely permitted at the plant site during the same time period I made my recordings.

My taping activity fulfilled the reportorial function envisioned by Congress when it enacted Section 210 and section 211 of the ERA.

The current process for resolving safety and Intimidation and Harassment allegations is neither timely nor effective. As can be seen in my case, in the three years since I filed allegations regarding the submission of criminal false statements, the managers for Southern Company and GPC who were implicated in those allegations, have not been sanctioned. Instead, in most cases they have been promoted and continue to exercise responsibility over six separate nuclear power units. The NRC, through delay, has allowed these serious questions and potential criminal conduct to be ignored and overlooked.

On the other hand, the personal and financial cost to my family and I has been incalculable. Of all the managers at Southern Company, I alone lost my job and career as a nuclear engineer. Since my termination in October 1990, I have been unemployed and have been unable to provide for my wife Kathy and my four children, Jason age 13, Adam age 11, Eric age 9, and Erin age 6. I could discuss at length with this commit-

tee the personal hardship which has befallen my family as a result of my documentation of criminal wrongdoing at plant Vogtle.

Instead, I plead with this committee to take prompt and aggressive action to ensure that no other whistleblower is forced to have their life destroyed merely for trying to make nuclear power in this country safe.

Finally, the Committee has asked for my views on how the NRC process of handling whistleblower issues can be improved. At a minimum, I recommend the following steps:

1. The practice of issuing civil penalties or Notices of Violation to utilities which are found to commit intimidation and harassment is completely inadequate. The NRC must require any utility found to have harassed a whistleblower to take affirmative action to abate the violation. In other words, the utility should not only be fined, the NRC must act to correct the problem. For example, if a safety component is found to be defective, the NRC does not just fine the utility and allow the defective equipment to remain uncorrected. The same standard must apply to instances of intimidation and harassment. Without requiring corrective action, such as reinstatement of whistleblowers or punitive actions taken against management or employees who engaged in intimi-

dation or harassment, the leveling of mere civil penalties is completely ineffective.

2. Given the importance of whistleblowers to the NRC regulatory scheme, and the very sensitive personal issues which confront whistleblowers, NRC investigation into intimidation and harassment must be prompt and sensitive to the personal hardship that can be produced. Long delays in investigating whistleblower concerns completely undermine the congressional intent of providing protection for these employees.

3. The NRC must be held to strict and enforceable standards to protect confidentiality.

4. An employee's reasonable use of tape recording to protect themselves from accusations and to document safety and intimidation and harassment must be unequivocally protected. In my case, no one challenged the right of GPC to surreptitiously tape it employees and members of the general public who called onto the site or who called certain selected managers at home. GPC's nearly unfettered discretion to invade the privacy of its employees with intense background screening, video monitors, physical searches of employees and their possessions,

one party taping which in some instances included illegal wiretapping (i.e., recording of telephone conversations which no party had knowledge of being taped), random sample and testing of employee urine, force psychological examinations, continuous monitoring of employees for "aberrant behavior," and mandatory fingerprinting. With all this infringement on the right to privacy, the NRC has somehow utterly failed to protect my ability to document criminal wrongdoing at a nuclear plant site with the aid of a tape recorder.

5. The termination of employees with good employment records prior to blowing the whistle should not be allowed to happen until after there is a ruling by the United States Department of Labor or the NRC that the termination is not pretextual.

I thank the subcommittee for an opportunity to address these matters and am willing to file additional testimony if it is deemed appropriate or necessary.

Respectfully submitted,

Allen Mosbaugh
1701 Kings Court
Grovetown, G.A. 30813

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ATTACHMENT 1

To: The Nuclear Regulatory Commission persuant to
Employees' Potential Safety Issues

On 10-13-88 at approximately 10:30 and again at 16:40 CST Plant Vogtle Unit 1 (operated by the Georgia Power Company) was willfully and intentionally placed in a condition prohibited by it's Technical Specifications. At the time Unit 1 had just been shut down for a refueling outage and the RCS had been drained to 188'-0"(midloop). Specifically valves 1-1208-U4-176 and 177 which are required locked closed were opened while the RCS was at midloop, a condition prohibited under Technical Specification(3.4.1.4.2) .By opening valves 1-1208-U4-176 and 177 a flow path was created resulting in unborated water flowing from the RMWST into the RCS.

In addition, the above action placed the plant in an unanalyzed condition and constituted an unreviewed safety question since this path (RMWST to the RCS) had not been analyzed for a boron dilution accident by Westinghouse for MODE 5 with reactor coolant loops not filled conditions.

The plant was placed in this condition by the Operations Manager, Skip kitchens, who holds a SRO license. ON at least one of these occasions he personally opened these valves because other licensed personnel had refused.

Valves 1-1208-U4-176 and 177 were opened to add the chemical hydrogen peroxide for chemical cleaning.This had been planned by the outage schedule to occurr prior to reaching midloop and in fact 2 additions were made prior to reaching midloop.Due to coordination problems however, the Operations Manager was faced with the need to add at midloop.In the interest of schedule he decided to order the addition.

On about 9-12-89 other plant personnel discovered the reference event and began investigating . The Operations Manager wrote a letter to the General Manager (NOV-00385) explaining his interpretation that an Immediate Action statement can be voluntarily entered and that the plant was not really at midloop during the additions on 10-12-88 and 10-13-88.The latter contention is false based on the Unit 1 Control Log.The former interpretation is contrary to the position taken by NRR of the NRC which has interpreted immediately as "without delay" or "as your next action" and the position taken by the NRC (NUREG\BR-0110,ISSUE NO.87-2,AUGUST 1987) on voluntary entry into Specification 3.0.3.

The issue of voluntary entry into Immediate Action statements was referred to SONOPCO corporate within about

a week .A position (ELE-00919) was issued which stated, "voluntary entry into an LCO which expressly prohibits a given condition and requires immediate corrective action should that condition exist,should not be made", but came short of concluding that it was prohibited.Based on that policy, this event has never been reported to the NRC under 10CFR50.72 or 10CFR50.73.

In the case at hand, the violation of the LCO goes far beyond the issue of "voluntary entry" and the intrepretation of "immediately".Valves required locked closed were intentionally opened .Unborated water was then intentionally flowed into the RCS (for the purpose of adding chemicals) diluting the RCS boron concentration .This created the possibility of uncontrolled boron dilution of the filled portion of the Reactor Coolant System and a subsuquent inadvertent criticallity accident,the very condition stated in the bases of Technical Specifications that is to be protected against.Fortunatly the above accident did not occurr, but because no analysis or testing had been done the safety of the plant was placed in the hands of luck.It would have taken only one single failure (such as a wrong size orifice or leaving the valve open too long) to escalate this event into an accident with serious safety significance. Finally this risk was taken in the interest of schedule, without requesting engineering evaluation,without adequate monitoring and controls,and without contacting the NRC for consideration or the advisability of discressionary enforcement.

ON 11-21-89 Georgia Power submitted a change (ELV-01077) to Technical Specifications to allow opening valves 1-1208-U4-176 and 177 at midloop.The stated purpose is to allow for chemical additions at midloop in MODE 5 and MODE 6. Since Georgia Power has now deemed a change to Technical Specifications necessary for subsequent opening of these valves it has tasitly admitted the violation of Technical Specifications which occurred on 10-10-88.

Despite costing approximately $50,000. to analyze, this previously unanalyzed condition ,no disciplinary action was ever taken with the Operations Manager for his cavilier approach to the requirments of regulations and the safe operation of a nuclear power plant. In fact he was subsuquently promoted to Assistant General Manager. The details of this event are known to all line management up to and including the Senior Vice President SONOPCO.

This event as well as numerous other events:

- Failure to perform adequate PORV surveillance
- Failure to perform adequate Steam Generator blowdown valve surveillance
- Failure to perform adequate E-bar surveillance
- Installation of Microfiltration test unit designed

in violation of Reg. Guide 1.140

Failure to perform adequate shutdown margin calculations

Failure to report missing fire penetration seals involving "intrepretation" of regulations and reporting of events has signaled to plant personnel, management's concurrance with this cavilier approach to regulations. A quick review of recent trends at Plant Vogtle indicates a return to the kind of conditions that existed in early 1987 when the same people were "in charge".Under SONOPCO they have been allowed if not encouraged to return to the operating philosophy of that troubled period.If this is not kept in check and reversed the quality of operations will not improve and there will be a serious event occurr at the plant.

A Concerned Employee

ATTACHMENT 2

A Moscaline

TROUTMAN, SANDERS, LOCKERMAN & ASHMORE
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
ATTORNEYS AT LAW
CANDLER BUILDING, SUITE 1400
127 PEACHTREE STREET, N.E.
ATLANTA, GEORGIA 30043
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CABLE: MAESTRO

CHARLES V. GERKIN, JR.

WRITER'S DIRECT DIAL NUMBER
658-6244

July 15, 1988

Mr. F. R. Timmons
Security Manager
Vogtle Electric Generating Plant
P.O. Box 282
Waynesboro, Georgia 30830

Re: Recording of Telephone Calls to Georgia Power Company Managers

Dear Mr. Timmons:

You have requested our advice concerning the tape recording of telephone conversations by persons who are parties to those conversations. You have indicated that certain managers of Georgia Power Company have been the subject of threats of violence and that you wish to have them record their incoming telephone calls as part of an effort to identify the source of the threats.

The issue of recording telephone calls is governed by three sources of law: the federal wiretapping statute, Federal Communications Commission ("FCC") regulations applicable to communications common carriers, and Georgia privacy statutes. The federal wiretapping statute prohibits such recording only where neither party to the conversation has given consent, so that there would be no problem under that statute with equipping a manager's telephone with a tape recorder so long as he or she consents to the recording. FCC regulations require common carriers to include provisions in their tariffs restricting such recording by their customers, but such restrictions are rarely enforced, and their violation will not lead to adverse consequences prior to a warning. Finally, the Georgia courts consistently have held that the Georgia privacy statutes do not apply to the recording of a conversation (whether or not by telephone) by a person who is a party to that conversation, so that the recording of calls is permissible under that statute so long as a party to the conversation has control over whether or not it is recorded.

Attachment 2

A. Federal Wiretapping Statute.

The federal wiretapping statute, 18 U.S.C. § 2510 et seq. generally prohibits "the aural or other acquisition of the contents of any wire, electronic or oral communication through the use of any electronic, mechanical, or other device," § 2510(4), which would include the tape recording of telephone conversations. A violation of these provisions is punishable as a felony. However, § 2511(2)(d) provides that it is not unlawful under federal law

> "for a person ... to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State."

Thus, in order to avoid liability under federal law, it is generally sufficient that one of the parties to a telephone conversation has given prior consent to the recording of the conversation.

B. FCC Regulations.

FCC regulations concerning the privacy of communications do not directly apply to end users such as Georgia Power Company. However, the FCC requires communications common carriers such as Southern Bell to include in their tariffs provisions prohibiting, subject to exceptions not relevant here, the tape recording of two-way telephone conversations unless either (a) all parties to the conversation give prior consent, either in writing or at the beginning of and as part of the recorded conversation, or (b) a distinctive tone is repeated at intervals of approximately fifteen seconds when recording equipment is in use. A copy of Southern Bell's presently effective Georgia tariff provision, § A15.1.1.D., on this subject is attached hereto. As provided in § A15.1.1.E., also attached, Southern Bell has the authority to suspend or terminate telephone service for violations of its tariff, but only after a warning and ten days' notice except where immediate action is necessary to protect the telephone network.

C. Georgia Privacy Statutes.

Official Code of Georgia Annotated § 16-11-62(4) provides that "[i]t shall be unlawful for ... [a]ny person

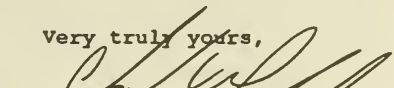
intentionally and secretly to intercept by the use of any device, instrument, or apparatus the contents of a message sent by telephone, telegraph, letter, or by any other means of private communication." As with the federal wiretapping statute, a violation of this section is punishable as a felony. Unlike the federal statute, however, Georgia law does not permit the recording of telephone communications with the consent of only one party to the conversation unless the call is itself criminal or directly in furtherance of a crime. However, the Georgia Supreme Court has held that the recording of a conversation by a person who is a party thereto is outside the scope of § 16-11-62 altogether. State v. Birge, 240 Ga. 501 (1978); Mitchell v. State, 239 Ga. 3 (1977).

D. Conclusion.

Except for the relatively remote possibility of a dispute with Southern Bell, there should be no legal problems with attaching tape recorders to the telephones of Georgia Power managers as long as they are given control over whether particular conversations are recorded. This policy would also be consistent with Georgia Power's policy of recording all incoming calls to the Georgia Power switchboard, subject to the control of the switchboard operators. Indeed, because a manager presumably would be given more discretion over whether to record particular calls in their entirety, there should be no basis even for an argument that the taping was improper on the ground that the employee was coerced into making the recording.

I trust that this discussion will be of assistance to you in developing a policy concerning the recording of telephone calls to Georgia Power managers. If I can provide you with any further information or assistance, please do not hesitate to call me.

Very truly yours,



Charles V. Gerkin, Jr.

CVG/s

Enclosure

ATTACHMENT 3

***** PLEASE NOTE ******
The level of detail contained in this concern will allow the Vogtle and SONOPCO management to conclusively identify the author.Because of the high level of the personnel involved and the seriousness of these concerns, I request that you do not reveal the text of this letter or the fact that this information was obtained thru an allegation, to Vogtle or SONOPCO personnel.I fear that retalitation including the possibility of physical harm could come to me or my family.I am concerned because of recent articles surrounding Gulf Power,a Southern Co. subsidiary,and the Jake Horton case as well as my observations of Georgia Power,SONOPCO, and Vogtle management for many years.
***** PLEASE NOTE ******

The Georgia Power Company has made two material false statements in written correspondence submitted to the NRC regarding Plant Vogtle's emergency diesel generator's control and starting air supplies and diesel generator testing.The statements are contained in correspondence ELV-01516 submitted on 4-9-90 in response to the NRC'S Confirmation of Action letter.The purpose of ELV-01516 was to explain Georgia Power's review,investigation and corrective actions taken with respect to the events involved in the Site-Area Emergency of 3-20-90 and to request the NRC to lift it's hold on criticallity and resumption of power operations on Vogtle Unit 1.

In ELV-01516 page 3, item 4 it states"GPC has reviewed air quality of the D/G air system including dewpoint control and has concluded that air quality is satisfactory.Initial reports of higher than expected dew points were later attributed to faulty instrumentation.This was confirmed by internal inspection of one air receiver on April 6,1990 which showed no indication of corrosion and daily air receiver blowdowns with no significant water discharge."

The above paragraph is materially false by omission and/ or commission in that it presents a conclusion (that air quality is satisfactory) that cannot be concluded from objective evidence and knowldege of Vogtle's Diesel generator air systems. This includes the dewpoint measurments taken,the procedures used, the maintenance history of the DG 1A dryers, the operational allignments,the air quality acceptance criteria requirments of the Vogtle diesel generators from the Vogtle FSAR and Vogtle's response to Generic Letter 88-14 in correspondence ELV-00197 page 3.

The following substantiates a less than satisfactory history of air quality:

1. Vogtle's response to Generic Letter 88-14 presents the "maximum dewpoint acceptance criteria for the VEGP diesel air start system ---as 50 F at system pressure " (225 to 250 psig).
2. Prior to 6-28-89 dewpoints were not regularly checked with no measurments taken in 1987 and only one taken in 1938.The 1988 value is theoretically impossible for the refrigeration type dryers installed(less than 32 F).The 2 measurments taken in 1989 prior to 6-28-89 were also theoretically impossible(less than 32 F).
3. Since the equipment used to measure dewpoints measures at atmospheric pressure and the criteria is at system pressure, a calculation or correction must be performed to adjust to reference pressure. The maintenance procedures used, do not include instructions for this and there are no calculational records or data that show how it was done .Therefore the accuracy of even post 6-28-89 data is not certain.
4. The maintenance procedure in use is contrary to the dewpoint measurment equipment vendors recomendations in that it uses a pressure regulator which the vendor says holds moisture and gives false readings.
5. Readings obtained on 3-9-90 and 3-31-90 exceeded acceptance criteria and were as high as 30 F.This was explained as "faulty equipment" but after that, on 4-6-90,valid dewpoint readings of 84 F were measured for Unit 1 DG air dryer K01 and 83 F for K02 as documented on DC 1-90-186.Maintenance work order 2-9000964 documents air quality problems on the Unit 2A diesel where nearly every dewpoint measurment exceeded acceptance criteria when measured with several kinds of instruments.Values as high as 95 F were measured on 4-9-90 thru 4-11-90.DC's were not written for these out of spec. conditions. Maintenance work order 2-9001136 documents continuing dewpoint problems on the 2A diesel.
6. The air dryers for the Unit 1A diesel generator have been out of service for excessive periods of time.Maintenance work order 1-88-02991 was open from 5-10-88 to 5-2-89 to repair both the K01 and K02 dryers.Refrigeration compressors as well as condensing fans have been broken.When preparing to perform the UV testing of the diesels for the IIT, air dryers were found out of service.
7. Despite having the air dryers out of service the associated compressors have remained in service.
8. The diesel generator utilizes a pneumatic air control logic system which has extremely small orifices as small as 6 thousandths of an inch.This air control

system takes its air from the starting air system.

9. Qualitative and gross observations at a few points in the system,one air receiver tank and a filter, is not sufficient to confirm satisfactory air quality and internal cleanliness of hundreds of air lines after years of inadequate air dryer maintenance and dewpoint testing.

10. Air in the diesel building is not air conditioned and therefore the air compressors utilize ambient air which in the Central Savanna River Area is typically extremely warm and humid much of the year.Without dryers in service,water in the system is bound to be a problem.

11. For periods of operation without dryers in service(which have been extensive) the air in the receiver would be saturated and have a dewpoint of that of room temperature.Receiver blowdown would not alter those conditions. For summer at Vogtle that would be 90 -100 F.Using psychometric charts a drop of approximately 30 F in dewpoint would occurr upon pressure reduction to the control air pressure of 80 psig.This would produce a dewpoint of 60 to 70 F which exceeds the acceptance criteria.This value is supprisingly close to the valid measurments recently taken with the dryers out of service.Clearly air quality should be expected to be unsatisfactory during periods when the dryers have been out of service.

Considering items 1 thru 11, the only conclusions that can be drawn is that the air quality for the Vogtle Unit 1 Diesels is unknown and indeterminant for the first 2 1/2 years of post license operation with known lengthly periods of dryers out of service during which times air quality probably was unsatisfactory against the acceptance criteria stated in response to Generic Letter 88-14.For the most recent period since 6-28-89 air quality was measured and generally met acceptance criteria except when dryers were out of service(the extent of which is dificult to reconstruct) at which times air quality was probably again unsatisfactory.At the time that correspondence ELV-01516 was signed by Georgia Power, 2 of 4 diesels had air quality problems with high dewpoints (outside acceptance criteria) ranging from 64 to 84F.

Dewpoints that high could easily result in water in the air lines as room temperatures cycle(when cool night or early morning air is drawn into the room).The outside air dampers locations in the Diesel rooms make this a destinct posibility.The presence of any water in the lines will lead to corrosion and particulate matter formation which could be carried to the pneumatic logic boards, sensor valves and other pneumatic components and could easily cause malfunctions.

In ELV-01516 page 3 item g. it states"Since March 20, 1990, GPC has performed numerous sensor calibrations (including jacket water temperature),extensive logic testing,special pneumatic leak testing, and multiple engine starts and runs under various conditions.Since March 20, the 1A DG has been started 18 times,and the 1B DG has been started 19 times.No failures or problems have occurred during any of these starts. In addition ,an undervoltage start test without air roll was conducted on April 6,1990 and the 1A D/G started and loaded properly."

The above paragraph is materially false by omission and/or commission because according to Vogtle control room logs and procedure 14980 data sheets the 1B DG had been started 29 times(see NOTE * below) since March 20,1990.It experienced 8 failures or problems during these starts and one problem with control air pressure between starts as follows:

Start	Date	Time	Comment
1	3-21-90	21:49	Diesel failled to start
2	3-21-90	21:56	Diesel failled to start
3	3-21-90	22:02	
4	3-21-90	22:59	Diesel had to be stopped due to low lube oil pressure and hi oil filter DP
5	3-21-90	23:14	Diesel had to be manually stopped because of high fuel oil DP
6	3-22-90	00:17	
7	3-22-90	04:28	
8	3-22-90	07:14	
9 #	3-22-90	08:54	
10 #	3-22-90	09:21	
11 #	3-22-90	09:50	
12 #	3-22-90	10:09	
13	3-22-90	11:06	Diesel tripped Hi Lube Oil Temp
14	3-23-90	05:09	Got B phase 127 Undervoltage relay flag on start
15	3-23-90	17:30	Diesel tripped Lo Jacket Water Press./Turbo Lube Oil Press.
16	3-23-90	17:44	
17	3-24-90	00:48	Got generator ground relay 164 dropout on start.Received DG1B Trip Hi Jacket water alarm.DG should have tripped but didn't.
18	3-27-90	16:49	
19	3-27-90	19:09	
20 *	3-27-90	19:51	

21	*	3-27-90	19:57	
22	*	3-27-90	20:04	
23		3-27-90	22:20	Diesel 1B Undervoltage Test
24		3-28-90	04:03	Diesel TS Surveillance 14980
25		3-28-90	13:50	
26		3-28-90	13:56	
		3-28-90	15:27	Diesel 1B Declared Operable
		4-03-90	05:15	Got Maint. lockout alarm due to low control air pressure (41 psi)
27		4-04-90	16:32	
28		4-05-90	00:30	Functional test of design change DCP 133
29		4-05-90	03:07	Diesel TS Surveillance 14980

Date of ELV-01516 4-9-90

30	4-10-90	01:37	Surueillance 14980
31	4-12-90	10:20	Surveillance 14980
32	4-16-90	00:00	Surveillance 14980
33	4-18-90	07:59	Surveillance 14980
34	4-19-90	03:14	Diesel inadvertently emergency started while performing Surveillance CSP-14619-1
35	4-19-90	09:55	Surveillance 14890

NOTE: # Denotes start not logged in control log but data sheet exists per procedure 14980-1
* Denotes start logged in control log but not documented by data sheet per procedure 14980-1

From the above it is clear that there have been numerous trips and problems with the 1B diesel since 3-20-90, many of which are associated with features being investigated to determine the cause of the 1A diesel failure, such as CALCON switches and control air.In addition, even if you disregard the trips and problems,there were only 14 successful starts on 1B Diesel since the time of the last trip and only 3 starts since the time of the last problem and the date of ELV-01516.
It is clear that the data do not support the claims made in the letter of" No failures or problems during any of these starts" for this diesel.It is particularly disturbing that Georgia Power has misled the NRC with this information, information presented to convince the NRC of the reliability of Vogtle's diesel generators and to obtain permission to resume power operations.

Since the cause for failure of the Vogtle diesel generator 1A and the subsequent testing and reliable operation of both 1A and 1B diesels is particularly significant to the Site-Area Emergency, the Confirmation of Action Letter and associated regulatory action and since ELV-01516 was signed

by the Senior Vice President SONOPCO, these Material False Statements are very disturbing.

SONOPCO personnel prepared ELV-C1516 and it was distributed to site personnel only after submittal to the NRC.SONOPCO requested the site PRB to review ELV-01516 after submittal to the NRC.Upon review by site personnel questions were promptly raised about the accuracy of the information. Detailled information and source documents including Diesel start and failure data used to compile the above concern have been provided to Al Chaffee of the NRC IIT team.

***** PLEASE NOTE *****
The level of detail contained in this concern will allow the Vogtle and SONOPCO management to conclusively identify the author.Because of the high level of the personnel involved and the seriousness of these concerns, I request that you do not reveal the text of this letter or the fact that this information was obtained thru an allegation, to Vogtle or SONOPCO personnel.I fear that retalitation including the possibility of physical harm could come to me or my family.I am concerned because of recent articles surrounding Gulf Power,a Southern Co. subsidiary,and the Jake Horton case as well as my observations of Georgia Power,SONOPCO, and Vogtle management for many years.
***** PLEASE NOTE *****

Georgia power has made an additional Material false statement in written correspondence to the NRC in Licensee Event Report 90-006 submitted 4-19-90.It is similar to the Material false statement made on 4-09-90 and involves the claims of successful starts without problems on Vogtle's Diesel generators that failed during the Site-Area Emergency of 3-20-90.

On page 5 under item D it states "Numerous sensor calibrations(including jacket water temperatures),special pneumatic leak testing,and multiple engine starts and runs were performed under various conditions.After the 3-20-90 event,the control systems of both engines have been subjected to a comprehensive test program.Subsequent to this test program, DG1A and DG1B have been started at least 18 times each and no failures or problems have occurred during any of these starts.In addition, an undervoltage start test without air roll was conducted on 4-6-90 and DG1A started and loaded properly."

The above statement regarding the number of successful starts without" failures or problems" subsequent to the control systems comprehensive test program is materially false by ommission or commission.The 1B diesel control logic testing was completed on 3-27-90 just prior to performing the first undervoltage test at 22:04 CST on 3-27-90 and prior to declaring the diesel operable at 15:27 CST on 3-28-90.Completion of this testing, is the earliest point in time that a claim of completing a comprehensive control systems test program could be made.Subsequent to that date and time until 4-19-90, DG1B has been started only 11 times.

The 1A diesel control logic testing was completed on 3-31-90 just prior to performing the first undervoltage test at 22:53 CST on 3-31-90 and prior to declaring the diesel operable at 11:54 CST on 4-01-90. Completion of this testing is the earliest point in time that a claim of completing a comprehensive control systems test program could be made.Subsequent to that date and time until 4-19-90, DG1A has also been started only 11 times.

This material false statement is similar to the one made by Georgia power on 4-9-90 in correspondence ELV-01516 and again falsely overstates the extent of reliable starting experience with DG1B and DG1A.Concern was raised by plant staff on 4-18-90 with the SONOPCO Licensing Engineer,the SONOPCO Licensing Manager,the SONOPCO General Manager Plant Support,the Vogtle General Manager,the SONOPCO Vice President Vogtle,and the SONOPCO Senior Vice President Nuclear as to the accuracy of the Diesel start information

and the fact that there had been "failure and problems" prior to submittal of the LER.SONOPCO was pressed for time and issued the LER without adequate verification and in the face of concerns for the accuracy of the information raised by the site.The issue of the accuracy of correspondence ELV-01516 including specific failure information was raised by site personnel on the phone call with the above personnel at the same time.

On 4-30-90 the Vogtle General Manager was provided a memo with start data on the DG1B ,derrived from control logs, shift supervisor logs and source diesel operating logs,that clearly showed that previous statements made to the NRC were false.He took no immediate action and ask for the information to be validated by operations and engineering.The information was validated on 5-1-90 and found correct.It was presented again to the General Manager on 5-2-90 and in this presentation it was stated that statements on both diesels 1A and 1B were incorrect in the LER and that the letter ELV-01516 was wrong as well.Still he took no action to promptly inform the NRC of the false statement and suggested that a revision to the LER be prepared. He also suggested that the letter ELV-01516 be corrected by including a correction in the letter being prepared for submittal to the NRC on 5-15-90. The General Manager did not follow up on the progress of these revision actions or set any time table for completion as he normally would on important issues.
A revision was made to the LER and approved by the PRB on 5-8-90.On 5-10-90 the PRB reviewed the 5-15-90 letter (actually submitted on May 14)to the NRC.It had nothing that addressed or corrected the material false statement as previously suggested by the General Manager.SONOPCO and the General Manager were heavily involved in writing ,editing and specifying the contents of the May 15 letter.The PRB made a comment on the fact that the letter did not address the material false statement and assigned the General Manager an action item to resolve that.
After the General manager saw the action item his secretary came to the PRB secretary's office and said "Doesn't NSAC have anything better to do than assign the General Manager action items".
Later on 5-24-90 the general Manager signed the action item off as complete and attached a note instruting the Technical Support Manager to use the LER cover letter to correct the other incorrect document.SONOPCO most always drafts the cover letters, not the Technical Manager.

On 5-11-90 the PRB met again with the General Manager to approve the "final" version of the May 15 letter to be sent to the Senior Vice President SONOPCO for signature.Again no correction had been made and the previous material false statement was not addressed.The "final" version was approved.The individual that had raised the issue of the

material false statements had been removed from the PRB by a memo from the General Manager(NOTS-00382) dated 5-10-90 and effective 5-11-90.

By May 15 the revised LER was with SONOPCO.No action occurred to submitt the LER to the NRC until about the first week in June when again site personnel began asking SONOPCO about what was taking so long to submit the correction.SONOPCO licensing personnel told site personnel that the Senior Vice President Nuclear planned to sign the revision on June 8 (the day of the IIT presentation to the Commission on the Vogtle Site-Area emergency).
On June 8,11 and 12 an extrordinary number of meetings and telephone calls occurred over the Diesel start information. Quality assurance was directed by the Senior Vice President to audit all of the Diesel start logs.When this was completed ,no errors were found in the information that had been presented to the General Manager over a month before on 4-30-90.With this done the Senior Vice President ask for a "complete revision" and updating of the LER.This was done and a revised LER was PRB approved by 6-22-90.Only 3 of 8 pages needed any rewrite on the "complete revision".A complete revision had originally not been planed until 6 months after the event.
The "complete" revision LER switches the counting and reporting of Diesel generator starts and failures to "valid" starts and failures per Reg Guide 1.108.By doing so correlation between the previous LER can not be made without detailed and specific data on each start.While the original LER was being drafted it was suggested that we might want to use "valid starts and failures" but that method was discounted because it was recognized that we had very few valid tests.If the original LER were stated in terms of valid starts we could only say "Subsequent to this test program the DG 1A and DG 1B have had 6 valid starts without problems or failures".If the CCA response letter were stated in terms of "valid starts" we could only say "Subsequent to the event the DG1A has had 1 valid test with no failures and the DG1B has had 2 valid tests with no failures".If valid tests are a more "useful" measure of Diesel performance then clearly the perception of the Diesel reliability changes from that previously provided to the NRC.

On 6-28-90 and 6-29-90 a total of 6 cover letters to be sent in with the LER revision were originated and proposed by SONOPCO.Each is different and attempts to explain the Material False statement in a different manner:

DRAFT

07:51	6-28-90	This draft says that all tests were counted but only valid failures were considered in reaching a conclusion there were no problems or failures.

08:55	6-28-90	This draft says that all tests were counted regardless of whether they were valid or not.
07:55	6-29-90	This draft says that the COA response letter used the words "Subsequent to the event" and that the LER inadvertently used the words "Subsequent to the test program" but should have been consistent with the COA response letter and the verbal presentation in Atlanta.
11:42	6-29-90	This draft says the LER statement didn't consider failures and problems associated with troubleshooting and restarting the Diesel and should have been "Subsequent to the event" which is consistent with the COA response and the verbal presentation.
12:06	6-29-90	This draft says that "If the comprehensive test program completed with the first Surveillance 14980-1 then there were 10 successful starts on DG1A and 12 on DG1B as of 4-19-90.
13:11	6-29-90	This draft says that "If the comprehensive test program completed with the first Surveillance 14980-1 then there were 10 successful starts on DG1A and 12 on DG1B.It also says that test program starts were included in the original count and that was due to poor record keeping practices and no definition of the end of the test program.

These explainations are all untrue and are being concocted after the fact without regard to how and why the errors were actually made.In short these are lies and an atempt to coverup the careless personnel errors made by the operations superintendent and General Manager which originated in the verbal presentation,were repeated in the COA response letter and were carelessly restated in the LER.

A look at the Diesel generators starting and failure history after the LER was written on 4-18-90 provides a technical as well as a objective view of the reliability of the diesels

which is at the heart of the Material False Statement.

Diesel Generator 1B

DATE	TIME	RESULT
04-19-90	03:14	Diesel was inadvertently started due to personnel error in performing Surveillance 14619-1
04-19-90	09:55	Successful start
04-29-90	09:09	Successful start
05-23-90	12:26	Diesel Tripped after start
05-23-90	13:10	Diesel tripped after start
05-23-90	14:12	Successful start manual trip
05-23-90	14:45	Successful start manual trip
05-23-90	21:18	Diesel tripped after start on low turbo lube oil pressure
05-23-90	21:38	Diesel tripped after start on low turbo lube oil pressure
05-23-90	21:57	Diesel tripped after start on low turbo lube oil pressure
05-23-90	22:55	Diesel tripped after start on Hi Jacket water temperature
05-23-90	23:37	Diesel tripped after start on Hi Jacket water temperature
05-24-90	12:29	Successful start
05-24-90	12:42	Successful start
05-24-90	12:53	Successful start
05-24-90	13:10	Successful start
05-24-90	15:19	Successful start
05-24-90	15:30	Successful start
05-24-90	19:16	Successful start
05-26-90	20:28	Successful start
06-01-90	11:45	Successful start

Clearly this diesel generator continued to experience an excessive rate of trips and failures most of which were the same kind of failure that led to the station blackout at mid-loop that occurred on 3-20-90.Clearly this diesel was not reliable as the COA response letter and the LER tried to convey.As further proof of the unreliability Georgia Power had to initiate a design change to remove some of the unreliable components from the control logic after experiencing all the additional failures.

Considering the evidence:

The words are false in counting the starts.
They overstate the reliability of the diesel.
They were used by NRC to make decisions "Significant to the Regulatory Process" (To allow Restart)
Concern was raised about the accuracy of the start data before submittal of LER.

SONOPCO personnell recognized that the previous (COA) startements were false before submittal of the LER.
Factual data was presented disputing the data after submittal and stating that information provided to NRC was incorrect.
Substantial delays occurred in starting to correct the LER.
Additional delays were introduced after beginning correction (QA audit).
Revisions were delayed until after critical meetings with NRC (6-08-90 IIT presentation to Commissioners)
Additional unplanned delays were introduced (complete revision) after QA audit substaintated inaccuracy claim.
Multiplicity of revision letters (also false) to explain the mistake.
Submittal to AEOD by LER revision to correct multiple non-LER errors.
Performance of the Diesel itself proves the unreliability and the falseness of the statements given to the NRC.
Above actions did not proceed without repeated and continuing expression of concern from the plant employee who exposed the Material False statement .

one can only conclude that Georgia Power did indeed make Material False Statements in written correspondence to the NRC due to as a minimum careless disregard and willfuly conspired to delay and cover up the disclosure of those false statements.

These serious events bring into question SONOPCO's and Georgia Powers' commitment to safety and it's fundamental trustworthiness as a licensee.

ATTACHMENT 4

To: The United States Nuclear Regulatory Commission
(attn. Bruno Uric, Allegations Coordinator)
From: Allen L. Mosbaugh

GEORGIA POWER/SONOPCO 2.206 PETITION RESPONSE IS FILLED WITH LIES

Among the most serious of the allegations made in the 2.206 Petition filed by myself and Marvin Hobby is the allegation that GPC thru SONOPCO submitted known, false statements to the NRC intended to mislead the NRC about the reliability of the Diesel generators specifically in an LER 90-006 dated 4-19-90. Perhaps the most significant charge is that the Senior Vice President SONOPCO, George Hairston, who signed the LER knowingly submitted false information to the NRC.

Now SONOPCO has answered the 2.206 petition in a sworn statement response signed by Executive Vice President Pat McDonald. The key facts of the response rebutting the above charge provided by SONOPCO to the NRC are blatantly false.

FALSE STATEMENT NUMBER 1

Specifically SONOPCO's response titled "Response to Hobby/Mosbaugh 2.206 Petition" Section II.b" page 3, last paragraph, footnote 3, the first fact presented is blatantly false.

Footnote 3--- "The wording was revised by corporate and site representatives in a telephone conference call late on April 19, 1990. Although Mr. Hairston was not a participant in that call, he had every reason to believe the final draft LER presented to him after the call was accurate and complete."

Originals of tape recordings are in the possession of the NRC made of the telephone conference call referenced in footnote 3. Participants whose voices are clearly identifiable on that tape are:

George Hairston, Ken McCoy, Bill Shipman,
Jack Stringfellow, George Bockhold,
John Aufdenkampe, Allen Mosbaugh

So it is proven by the tapes that Mr. Hairston actively participated in the conference call late on April 19, 1990.

Attachment 4

Indeed Mr. Hairston's involvement in the detailed development and wording in the LER was extensive to the point of personally interviewing plant operators, a fact SONOPCO apparently does not want the NRC to know.

Now Pat McDonald sworn statement is another lie.

FALSE STATEMENT NUMBER 2

Specifically the second fact presented in footnote 3 is false as well as the statements in section IIB, page 5 last paragraph.

Footnote 3--- "The wording was revised by corporate and site representatives in a telephone conference call late on April 19, 1990. Although Mr. Hairston was not a participant in that call, he had every reason to believe the final draft LER presented to him after the call was accurate and complete.

AND

Page 5--- "the suggestion that GPC officers or their upper level staffs, who were aware of these efforts, would knowingly provide false information is ludicrous. The converse is the truth:"---

AND

Page 5---"The allegation that GPC officers would attempt to mislead the NRC with incorrect information is , in a word, absurd."

Mr. Hairston, The Senior Vice President Nuclear, had enumerable indicators and apparently direct knowledge that the information presented to him was suspect if not outright false before he signed the LER. Bill Shipman is an upper level manager, in fact a General manager, who reports to the Vice President Vogtle Project, Ken McCoy.

The following is a segment as stated on recordings of the conference call referenced in footnote 3.

Shipman ----- Lets see, what other questions have we got. We got the start thing straightened out.
Stringfellow -- The other question we had Bill was---
Hairston ---- We got the starts-- So we didn't have no, we didn't have no trips?
Shipman ----- No, not not
McCoy ----- Let me, I'll testify to that.
Shipman ----- Just disavow.
Shipman ----- What else did we have Jack.

At this point the conversation shifts rapidly to other

subjects of the LER which Hairston continues to participate in.

Immediately it is apparent that Hairston was well aware of the diesel trips by his question "So we didn't have no, we didn't have no trips?" and therefore the falsehood in the LER.

Next we hear the "SMOKING GUN" evidence.

McCoy states to Mr. Hairston the strategy that he intends to use to deny the false statement they are about to make. McCoy will "testify" that he did not know it was false since Allen Mosbaugh had not talked to him. Shipman will "disavow". Bill Shipman, McCoy's General Manager over licensing, was just put on notice by Allen Mosbaugh (see below transcript), just 2 hours before, of the of numerous details of the diesel trips and he acknowledged the falsehood of both the LER and COAR statements. Realizing the liability of the brief exchange that has just occurred Bill Shipman rapidly shifts the conversation to other topics.

Pat McDonald statements in the Petition response underlined above are outright lies to cover the criminal conduct of Hairston, McCoy, and Shipman.

Near the end of the conference call:

Aufdenkampe--	Hey Bill.
Shipman-----	Yea
Aufdenkampe--	This is John. Are these all the changes we're going to make because I don't think there is anything substantial that needs a PRB?
Shipman----	I won't make that guarantee, John.
Aufdenkampe--	But, OK, So I need to keep someone on standby to do that?
Shipman-----	Yes sir you sure do.
Aufdenkampe--	OK, I'll have whoever is going to be on standby give Jack a call, in case this thing drags on till 7:00 or 8:00 at night or something like that.
Shipman----	It's not going to be that long.
McCoy------	We'll be done with this in about 30 minutes with the changes and we'll call you back and let you know and you can make a judgment on whether we have to go back to the PRB.

This sets the time frame for the call as just prior to the final signing by Hariston and indeed the one referenced from Footnote 3 of GPC's response.

As further evidence of Hairston's and SONOPCO's prior knowledge of the Diesel trips and failures that made the LER statements false is the following segment of another tape recording, originals of which are in the NRC's possession. This call contains documentation of part of the actions of the "LER coordinator" described in SONOPCO's petition response on page 3 middle paragraph.

Allen Mosbaugh places this call to Bill Shipman on 4-19-90 approximately 2 hours before the above call with Mr. Hairston and puts senior SONOPCO personnel on notice of the false information in the LER. Known participants on this call are Shipman, Mosbaugh, and Stringfellow.

Shipman --- Hello
Mosbaugh--- Yeah This is Allen Mosbaugh.
Shipman --- Hey Allen. This is Bill Shipman.
Mosbaugh--- Say Bill.
Shipman---- Are you where you can talk for a minute.
Mosbaugh--- I am.
Shipman --- Great. I-- Help!
Mosbaugh--- OK
Shipman---- The , uh, LER, uh, we're, we're, you know, we're trying to get, you know, all Mr. Hairston's questions answered.
Mosbaugh--- Right
Shipman --- Uh, there are 2 things, uh, I guess, uh George has ask us to, you know, to find out and I guess you, you were probably at the time talking to Jack----

A discussion proceeds discussing the first Hairston question which regards operator responses when they first arrived at the Diesel generator room.

Below Hairston shows awareness of the start information controversy in that he has ask for assurances on the start data.

Shipman--- OK and of course the other question we have been trying to get an answer to is to reassure George that we had more than 20 valid starts since , you know, since March 20, like we say in the LER.
Mosbaugh--- Yeah, You realize I think there's a problem with the way that's' stated because you know the machine -- we can--,you know, we've got one of the guys trying to find what the total number of valid starts is, but there were failures.
Shipman--- Yeah. The problem that we got, Allen, is that the data that's in the LER is what George wrote and took and told to the--

Ebnetter last Monday in Atlanta.
Mosbaugh--- Well, you know, if anybody said that there weren't any failures, then, you know, that's just not true.
Shipman--- Well if you look at George's cutline that he made to take to Atlanta with him, he says at that time it was like 18 or 19.
Mosbaugh--- Yea.
Shipman---- And without a failure.
Mosbaugh--- Mm.
Shipman---- So you know somebody had given George that information.
Mosbaugh--- On the B--
Shipman---- Have we had a failure since George went to--- ?
Mosbaugh -- No.
Mosbaugh -- On the B---Let me tell you what I know. On the B machine, on the B machine on 3-22 at 12:43 the machine tripped on hi lube oil temperature.
Shipman --- Caused by what?
Mosbaugh--- Caused by the switch that gives you high lube oil temperature probably.
Shipman--- No. I understand that, but did we not have a---
Mosbaugh--- I don't believe that a high temperature physical condition existed. I believe---
Shipman---- Was that a valid-- considered a valid failure?
Mosbaugh--- I haven't assessed these for being valid or not.
Shipman---- You see, because I could, we could solve the problem created by that information by saying "no valid failures".
Mosbaugh---Let me find --- I think we've got one other one. It is on 3-23 at 17:31 , Machine tripped on low-- this is B machine again-- on low jacket water pressure slash low turbo lube oil pressure low.
Shipman --- OK , the first one was on what date did you say?
Mosbaugh--- 3-22
Shipman---- OK , How you know with that data?--- I think this thing has already been thru the PRB a couple of times-- How the world did it get thru the PRB ?
Mosbaugh -- What's that?
Shipman---- The statement.
Mosbaugh--- The LER or--?
Shipman---- Yea the LER.
Mosbaugh--- Well I mean--
Shipman---- Did that data-- was that not available in the PRB?
Mosbaugh--- The previous time that this LER went thru

the PRB, I'm not sure those statements were in there.

Shipman---- Yes, Jack says yes they were.

Mosbaugh--- They were?

Shipman---- Yes.

Stringfellow-In fact , the last PRB added the parenthetical phrase "more than 20 times each". I say the last, not, today but the previous PRB.

Clearly Shipman has been put on notice by Allen Mosbaugh of very specific information that the diesel tripped and that the LER information is false.
Clearly Shipman realizes the COAR was false by his comments about the presentation to "Ebnetter".
Clearly Shipman recognizes that the LER is false by his comment, "How the world did it get thru the PRB"?
Clearly Shipman is contriving a way to use "valid failures" to "solve the problem created by that information".

Further discussion ensues with Shipman and Stringfellow continuing to blame the PRB .

Later on the same call:

Shipman--- So, you know, if there's anything you need to do to check to make sure the data you have from Paul is correct and valid I would ask that you do that or if you feel very confident that it's correct now I just need to see what I need to do to about striking this statement.

Mosbaugh--- OK. I feel that this is the best, the best data there is and I believe it is accurate. I will verify that with Kochery though and I will pursue trying to get a conversation with the operator.

Shipman---- OK. Jack and I are going to leave here and walk down to Mr. Hairston's office to go over his comments and what we've been able to do with those and try to finish beating out what he wants to do with this thing.

The call ends shortly thereafter.

Clearly Shipman and Stringfellow proceed to inform Hairston of what they have been told by Allen Mosbaugh. Thus, this additional evidence further shows that Hairston knew that the LER was false hours before he signed it.

FALSE STATEMENT NUMBER 3

Specifically SONOPCO's response makes great efforts to blame Allen Mosbaugh for the errors and states on page 4 of their section IIB:

"Not until April 30 1990 does it appear that Mr Mosbaugh articulated for the benefit of his management that the diesel engine start count data contained in the LER was inaccurate"

Clearly the transcript from FALSE STATEMENT NUMBER 2 above with Bill Shipman proves that Allen Mosbaugh articulated for the benefit of his SONOPCO management detailed information on the diesel failures and therefore in the diesel count data statements and that his SONOPCO management recognized the errors contained in the LER before it was signed on 4-19-90.
As such GPC/SONOPCO's underlined statement is blatantly false.

FALSE STATEMENT NUMBER 4

Specifically Georgia Power SONOPCO states on page 4 of IIb of their response:

"To the extent Mr. Mosbaugh had concerns about the substance of the document , he had direct and immediate ability to change the information contained in it. His own actions relative to the LER establish this fact. Indeed , as reflected in PRB comment review sheet for its meeting No.90-59, held on April 18, 1990 Mr. Mosbaugh directed three changes to the draft LER, two of which he directed as "mandatory" word changes. He, therefore, had an opportunity to require any other correction. Similarly on April 19 1990 in a telephone conversation between the site representatives and Corporate Office representatives, he had the opportunity to suggest corrective language but, apparently failed to do so."
And
From page 5--- "If as he now alleges, Mr. Mosbaugh truly had concerns related to the original LER, his inaction on April 18 (at the PRB), in the April 19 telephone conference, and his April 30 assignment from his General Manager to provide revised LER language provided him numerous opportunities to direct revision or to revise the alleged "false statements." This he failed to do.

Again SONOPCO goes to great lengths to accuse Mr. Mosbaugh of insincere motives and to blame him for the errors. Clearly from the transcript from FALSE STATEMENT 3 above it can be seen that on a telephone conversation between site and corporate representatives Mosbaugh, Shipman, and Stringfellow , Allen Mosbaugh caused Mr. Shipman to

conclude that corrective language (ie. complete deletion of the false statement) was in order. Mr. Mosbaugh left with the understanding that the false statement would be struck. He obviously did not have direct and immediate ability to change information in the LER since all corrections had to go thru SONOPCO personnel and only Mr. Hairston would sign the final version.

Another example clearly showing the attempts of Allen Mosbaugh and other site personnel to put SONOPCO on notice of the false statement in the LER and to try to "direct revision to" correct it is contained below from a conversation between site and corporate personnel that occurred earlier on 4-19-90.
Known participants are :

Jack Stringfellow, John Aufdenkampe, Allen Mosbaugh

Stringfellow-- But now you know it just dawned on me about what Allen was saying a minute ago, in other words, "And no failures or problems have occurred on any of these starts" Your saying that's not true.
Aufdenkampe-- Yes. I'm saying that's not true.
Stringfellow-- Oh Wonderful. OK
Aufdenkampe -- Which is also be telling you that-- It's telling you something else I imagine.
Because you know this has been written to the NRC once already.
Stringfellow-- Yes I know. That's exactly what I was thinking.

Here again SONOPCO personnel clearly recognize that both the LER and the Confirmation of Action Response letter signed by Hairston on 4-9-90 are false.

Below in a earlier segment of the same conversation on 4-19-90 with the same participants, John Aufdenkampe (who worked under Allen Mosbaugh) is conveying to SONOPCO licensing the comments from the latest meeting of the Plant Review Board.
Allen Mosbaugh arrived late for the 4-19-90 PRB and missed the discussion of LER 90-006 and as such did not vote on it. If Mosbaugh did indeed have the "direct and immediate ability" to make changes to the LER on behalf of his organization or the PRB, he clearly did so as evidenced by the above reference conversations, and from the additional excerpt contained below.

Aufdenkampe -- The next page. On the 20 starts.
Stringfellow-- Yea Yea Yea
Aufdenkampe--- I'm struggling with that one.
Stringfellow---You struggle with that one.

Aufdenkampe--- I'm struggling with that one.
I'm trying to verify that still.
Stringfellow-- Oh, OK, Alright
Aufdenkampe--- We think that's basically a Material false statement.
Stringfellow-- Really!
Aufdenkampe--- Yea, well we know for a fact that the B diesel tripped at least once, after March 20
Mosbaugh------ Actually it tripped twice after March 20 or it had at least 2 separate problems.
Stringfellow-- Well do we need to take this more than 20 times each out?
Aufdenkampe-- That's what we're thinking-----

Again in direct contrast to Georgia Power/SONOPCO statements throughout the underlined paragraph of page 4 and 5 of section IIB of the GPC response it is clearly seen that Allen Mosbaugh personally and using his staff tried (ultimately in vain) to get SONOPCO to correct the false statements in the LER before Mr. Hariston signed it.
Again the Site personnel recommend that the false statement should be "taken out" as evidenced by Aufdenkampe's last statement.
SONOPCO ignored these attempts so as not to expose the false statement already made to the NRC in the COAR on 4-9-90 by Mr. Hairston and Mr. Hairston knowingly signed out a LER to the NRC containing false statements.

GPC's reference to the "assignment from his General Manager" occurred only after Allen Mosbaugh provided to Mr. Bockhold a memo in writing exposing the false statements in both the COAR and LER.
Again contrary to the GPC response, Mr. Mosbaugh performed his task of providing a revised LER promptly and accurately and by 5-15-90 a revised LER correcting the false information was PRB approved and in SONOPCO's hands but SONOPCO would never submit it.
A revision with different wording of SONOPCO's choosing which changed the whole basis to "valid starts" would not be submitted until 6 weeks later.
To complete his assignment of "revising the alleged false statements" Mr. Mosbaugh also issued an action item on 5-10-90 to George Bockhold to determine how to correct the COAR. Bockhold closed the action item on 5-24-90 but failed to correct the errors in the COAR until 8-30-90 and then only under pressure from the NRC.

Again as exhaustively detailed above, the sworn statements in the underlined paragraph above signed by Pat McDonald are false by both omission and commission.

<u>FALSE STATEMENT NUMBER 5</u>

Specifically GPC/SONOPCO response III.3 ,IID., page 9

first paragraph (referring to the draft transmittal letter dated 6-29-90 07:55 and 6-29-90 11:42).

"In both instances, the draft transmittal letter explains that if the report had stated "subsequent to the event" rather than "subsequent to the test program," the LER would have been consistent with the April 9 COAR and the "18" and "19" numbers included in the transparencies provided by GPC to the NRC on April 9. This is a correct statement.

This statement is false by omission and/or commission. First as is proven from the draft transmittal letters themselves, the text explains a lot more than "if the report had stated subsequent to the event" , the text states "The LER dated April 19 inadvertently stated "Subsequent to this test program, DG1A and DG1B have been started at least 18 times each and no failures or problems have occurred on any of these starts" and "The report should have stated "Subsequent to the event... "rather than "Subsequent to the test program..."."
GPC uses this omission to avoid explaining their false claim of an "inadvertent error" in the transmittal letter.

Below is a portion of the transcript from the telephone conference call late in the afternoon of 4-19-90:

Bockhold---- From my numbers that I presented at the at the conference. They were verified correct by Jimmy Paul Cash who went thru the operator logs.
McCoy------- We ought , you ought to use those numbers.
Bockhold---- OK so we'll say greater than those numbers that were used in the conference.
McCoy------- OK and those numbers you used were used in the conference were after they had completed the comprehensive test of the control system on each diesel.
Bockhold---- That is correct. Those numbers were not before that time.
Stringfellow-OK I just want to make sure I'm clear. You want to say that between 3-20 and now DG1A and DG1B have been subjected to a comprehensive test program.
Do we want to say that kind of stuff?
Or do you want to say--?
Bockhold---- Yes. You can say that.

A moment later:

Shipman----- 18 and 19, What did you have in your presentation George? 17 and 18 or 18 and 19
Bockhold---- 18 and 19
Shipman ---- So if we say greater than 18 we --

Stringfellow-I thought we had more than 18 times.
Bockhold---- Greater than 18 would be good.
McCoy------- It wouldn't be more than 18 on one of them it would be 18-----

As shown by the transcript from the above telephone conference call (referenced by GPC's Footnote 3) , the final wording "subsequent to the test program" was not inadvertent, was discussed specifically and in detail as being consistent with April 9, 1990 presentation. Despite the fact that Shipman and Stringfellow had been put on notice by Allen Mosbaugh that the April 9 presentation was false and they had acknowledged that it was false, they and Bockhold and McCoy proceeded to usher in words to the LER that are as false as the April 9 presentation.

FALSE STATEMENT NUMBER 6

Specifically GPC response III.3 page 4, first full paragraph.

At that time, he was assigned, in writing, to correct the NRC documentation (Exhibit 7). He, therefore, was tasked with correcting the inaccuracy which his Technical Support group had created by suppling "more than 20" times" wording to the Corporate Office.

This statement is false. Allen Mosbaugh was not task with correcting any inaccuracy associated with the "more than 20" words because the "more than 20" words were not used in the LER and they were not the basis of the actual "at least 18" statement contained in the LER. As can clearly be seen from the transcript from FALSE STATEMENT NUMBER 5 the basis of the words in the LER was the decision and desire of McCoy, Shipman, Bockhold and Stringfellow as a minimum to use the same false start count as was in the April 9 presentation. The GPC response continuously tries to distract attention from the facts, the truth, and themselves by attempting to focus on and blame Allen Mosbaugh for SONOPCO's lies.

CONCLUSION

This is but a sampling of the false statements contained in GPC/SONOPCO's response to the Mosbaugh/Hobby 2.206 petition, but from these examples alone (the lies of Pat McDonald and the actions of the responsible Officers and senior management of GPC/SONOPCO) the conduct is so dishonest and fundamentally untrustworthy, that they should be removed from authority over any NRC Licensed Nuclear Power activities in GPC/APC/SONOPCO in the interest of public safety.

ATTACHMENT 5

UNTIED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of MOSBAUGH, Complainant, v. GEORGIA POWER COMPANY, Respondent.	)	91-ERA-11

MOTION TO QUASH SUBPOENA OF LARRY ROBINSON

The United States Nuclear Regulatory Commission ("NRC" or "Commission"), on behalf of its employee, Larry Robinson, respectfully moves for an order pursuant to 29 C.F.R. § 18.24(c) quashing Complainant Mosbaugh's subpoena requiring Mr. Robinson's oral testimony in the above-captioned matter. A copy of the subpoena is attached to this motion as Exhibit A.[1] The NRC's General Counsel has sent a letter to Mr. Mosbaugh's counsel refusing permission for Mr. Robinson to testify. A copy of this letter is attached as Exhibit C.

10 C.F.R. §§ 9.200 through 9.204, issued pursuant to 42 U.S.C. § 2201(p), are attached to this motion as Exhibit D. These

[1]The subpoena for Larry Robinson was served on February 18, 1992. By verbal agreement memorialized by a letter (Exhibit B) dated February 24, 1992, counsel for Mr. Mosbaugh and the NRC agreed to extend the time under DOL rules to move to quash a subpoena pending attempts to execute an affidavit as a substitute for live testimony. As more fully set for in Exhibit C, this attempt failed.

regulations provide that an employee of the NRC shall not disclose or testify about information or material acquired as part of the performance of the employee's official duties or status without prior approval of the NRC. Courts have repeatedly up and enforced similar federal agency regulations restricting access to federal employees demanded by subpoena absent agency consent. See, e.g. United States v. Ex Rel. Roger Touhy Ragen, 340 U.S. 462 (1951); Boske v. Comingore, 177 U.S. 459 (1900); United States v. Bizzard, 674 F. 2d 1382 (11th Cir. 1982) cert. denied, 459 U.S. 973 (1982); Florida v. Cohen, 887 F. 2d 1451 (11th Cir. 1989). Mr. Mosbaugh's failure to obtain NRC consent to Mr. Robinson's testimony is fatal to the effectiveness of the supboena. See Saunders v. Great Western Sugar Co., 396 F. 2d 794 (10th Cir. 1968); Davis v. Braswell Motor Freight Lines, 363 F. 2d 600 (5th Cir. 1966).

As more fully set forth in the NRC General Counsel's denial of Complaintant's request that the NRC make available Mr. Robinson to testify (Exhibit C), the testimony demanded by Mr. Mosbaugh would (1) significantly interfere with ongoing NRC Office of Investigations investigations, (2) calls for testimony not within the personal knowledge of Mr. Robinson, (3) is not essential to the matters at issue in the litigation, and (4) is not relevant to the matters at issue in the litigation.

WHEREFORE, the United States Nuclear Regulatory Commission, on behalf of its employee, Larry Robinson, requests that this motion to quash the subpoena be granted.

Respectfully submitted,

JOHN F. CORDES
Solicitor

Daryl M. Shapiro
Attorney
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
(301) 504-1606

Dated: March 5th, 1992

TESTIMONY OF A.W. DAHLBERG, III

SENATE SUBCOMMITTEE ON CLEAN AIR & NUCLEAR REGULATION

JULY 15, 1993

I welcome the opportunity to provide the Subcommittee on Clean Air and Nuclear Regulation these comments which address the raising of concerns in the nuclear power industry. In my opinion, the focus of the Subcommittee should be on how the nuclear industry and the government, working together, support and facilitate the type of workplace and its employees' current, high degree of responsiveness in resolving nuclear safety and quality concerns. I am here personally and as CEO of Georgia Power Company because I am proud. I am proud that the nuclear industry and the Georgia Power Company have fostered a workplace environment in which, on a daily basis, literally hundreds of workers identify and address in their routines various issues which relate to nuclear safety. There is nothing here that is broken and needs to be fixed. My message to you is: At the Georgia Power Company, the system works.

There is one major reservation that I need to assert at this time. I know that our attorneys have previously addressed with the members of your staff, Senator Lieberman, the fact that there are four pending administrative matters before United States regulatory agencies at this time. Mr. Mosbaugh's testimony and the questions to him have touched on these four cases. We believe that holding this hearing at this time, and allowing Mr. Mosbaugh to testify with the apparent consent and approval of the United States Senate, and in the presence of NRC Commissioners, is patently unfair and inappropriate. It presents the risk of endangering and undermining the integrity of the ensuing decisions by the NRC. That is why I expect to restrict my comments from entering into the areas of any of the active NRC investigations.

A. <u>Industry Support for Employees Who Raise Concerns</u>.

The industry and its employees have recognized that they have a vital, mutual stake in the free flow of safety-related information. They know the right of each employee to pursue issues is necessary for the safe and reliable operation of nuclear power plants. The critical need to foster an environment where all feel free to identify potentially unsafe conditions or practices, is borne not principally from regulatory requirements, but, rather, from enlightened self-interest. Protecting the health and safety of the individual workers, their families and the communities in which they live and work, and in safeguarding the human and financial resources associated with nuclear power plants are direct and immediate goals of all workers in the

industry. Stated simply throughout the industry: "Safety is first."

Workers in the nuclear power industry are repeatedly encouraged by the licensees, their fellow workers and the NRC to bring safety concerns to the attention of line management. From the executive officers to the first-line supervisors of licensees, established chains of command create an obvious method for employees to voice safety concerns. The licensees have made it clear to each employee that the raising of safety concerns is an obligation, not an opportunity. It is an obligation that those in the industry fulfill on a daily basis, without expectation of special privilege or favor.

The overwhelming majority of industry employees feel free to raise safety concerns without fear of reprimand or reprisal. The empirical and anecdotal evidence is conclusive that the existing process is working and that the individuals who identify potential nuclear safety concerns are viewed and treated as important contributors to the achievement of compliance and operational excellence. Yes, there are exceptions. But in an industry populated primarily by highly skilled, highly educated and assertive professionals, the fact that annually less than one tenth of one percent (0.1%) of industry employees file Section 211 claims under the Energy Reorganization Act is a testament to the industry's success in promoting the open and frank exchange of ideas and information. To my mind, these employees and licensees are achieving on a daily basis precisely what the Subcommittee demands - an unfettered commitment by each employee and every level of management to voice, accept, investigate and resolve potential safety concerns. They do so because it is an accepted part of each worker's own job and personal responsibility to the safe and reliable operation of a nuclear power plant. They do not act out of a desire to seek personal fortune through payoffs. They do not use abusive or specious litigation.

B. Georgia Power Company's Support For Employees Who Raise Concerns.

Georgia Power Company is the licensee of four nuclear power units which supply approximately one-fifth of the electricity required by Georgians. We have constructed, maintained and grown an effective network of programs supportive of the employees' obligation to raise nuclear safety concerns. We have a management philosophy of openly and frankly identifying and communicating potential problems, in order to resolve problems at the earliest possible stage. We even maintain a widely distributed "problems list" so that all are aware of the opportunities to enhance the margin of safety and efficiency of the plants.

The internal mechanisms for soliciting, addressing and resolving concerns over nuclear safety, as well as other workplace concerns, are found at both plant and corporate levels. The plants maintain "Deficiency Card" systems as established, formal methods for plant employees or managers to document and notify their supervision of a potential quality or safety concern. The Deficiency Card system requires that the concern be systematically addressed and, if necessary, resolved by appropriate management. Also at the plant level, we operate a Quality Concern program, dedicated to acceptance and investigation of nuclear safety or quality concerns. Concerns may be submitted anonymously. Confidentiality is offered to those who desire it, and non-retaliation is guaranteed to all.

At the corporate level, we maintain the Corporate Concern Program, a direct outgrowth of the success of the nuclear plant Quality Concern program. The Corporate Concern program allows a plant employee to file a concern at a level reporting directly to the Company's executive officers, outside the established chain of command. Once again, confidentiality and non-retaliation are assured.

Employees can also call or contact me or other officers directly, and we will, and have, directed investigations of their concerns. Our nuclear officers are not ivory tower types -- they know their plants and their people, and those employees know and trust them.

Finally, the Company maintains and encourages, at both the plant and corporate levels, open and frequent communication with the NRC and its resident inspectors. This communication permits the NRC to remain informed about developing issues at the plant, including "major problems" identified by the licensee, and to obtain frank views on issues from our employees.

C. <u>Company Support For Mr. Mosbaugh</u>

I am not going to rehash what is already a matter of public record related to Mr. Mosbaugh's claims and allegations against Georgia Power. Those claims have repeatedly been found to be without merit by the Department of Labor and the NRC. There is more than enough information to defend the Company. But a real danger exists in such discourse: that well-intentioned, dedicated employees will be inhibited by unbalanced publicity associated with the discussion. We do not want headlines to read "Georgia Power attacks whistleblower." Instead, we want the sound bite: "Georgia Power seeks safety concerns." Therefore, I prefer to show simply that Mr. Mosbaugh is not the victim of Company reprisal or a totally unresponsive bureaucracy. Instead, his actions demonstrate an aberration -- an employee who abused the system for personal advantage.

The Company repeatedly responded to Mr. Mosbaugh's concerns in an honest, straightforward effort to fully resolve the concerns as soon as possible. When his concerns were anonymously sent to the NRC, Georgia Power cooperated with the NRC's inspectors and investigators. When he personally raised his concerns with his supervisor or with the Quality Concerns program, Georgia Power professionally addressed those also, without retaliation or other adverse treatment to Mr. Mosbaugh. In hindsight we know, now, that many concerns which Mr. Mosbaugh submitted to the NRC had been previously raised with Georgia Power and had been resolved internally.

It bears repeating that when Mr. Mosbaugh did choose to utilize a Company process, the concern was fully and openly addressed and resolved. This approach included issues raised to the Plant Review Board, to the general manager of Plant Vogtle, and to the plant's Quality Concern program. On repeated occasions, Mr. Mosbaugh was personally assigned to address and, if possible, resolve his own concerns.

In the summer of 1990 Mr. Mosbaugh, the Georgia Power Plant General Manager and the NRC's Resident Inspector met at the request of the General Manager. At that meeting Mr. Mosbaugh was directed to articulate for the benefit of his employer and the NRC all of his safety concerns. He indicated difficulty in formulating all his concerns. So a manager outside his chain of command was assigned to work with him to collect information to fully develop and air his concerns. When, just weeks later, Mr. Mosbaugh indicated reluctance to cooperate with this manager, he was <u>instructed</u> in writing to take his concerns to the NRC resident inspector. His work assignments included cooperating with the NRC. This was made his top job priority. We didn't know it at the time, but we now know this was in addition to Mr. Mosbaugh's own confidential contacts with the NRC.

Additionally, Mr. Mosbaugh's first DOL Complaint was filed on June 6, 1990. He filed an amendment to that Complaint later in June. Throughout June and July 1990, the Department of Labor investigator worked with Mr. Mosbaugh and his attorneys, as well as Georgia Power employees and the Company's employees. Employees were made available for interviews and statements and Mr. Mosbaugh's concerns were fully reviewed by the Department. The DOL Determination, finding no retaliatory conduct, was issued on July 24, 1990.

Against this background of NRC and DOL activity, Mr. Mosbaugh was offered a position in Senior Reactor Operator (SRO) License training, as well as an associated supplemental stipend. The Company would spend approximately a quarter of a million dollars to enhance Mr. Mosbaugh's training and career. This was the assignment which he had listed as the one which <u>he</u> preferred for his future development and career. The point is

that Georgia Power didn't just encourage Mr. Mosbaugh to raise concerns with the NRC - it mandated that he do so. He wasn't punished for that activity; he was given his number one choice of jobs available.

In sum, Mr. Mosbaugh does not represent a weakness in the current systems at Georgia Power or in the industry. He represents a strength of the industry and Georgia Power's established programs -- the commitment of licensees to achieve a satisfactory resolution of nuclear safety concerns, even when the raising of such concerns may be driven by an employee's personal agenda.

D. The Decision To Terminate Allen Mosbaugh.

Section 211 of the Energy Reorganization Act has a clear purpose to support the industry's goal of maintaining free flowing communications by protecting employees against reprisal.

When I made the decision to terminate Allen Mosbaugh, I was not presented with the question of whether I could discharge Mr. Mosbaugh based on the information I had before me regarding his activities. I was forced to address the question of how could I not discharge him and still fulfill my obligations to the public interest, the employees of Plant Vogtle and the safe and reliable operation of a nuclear power plant. Given his actions, I had no other reasonable choice but to discharge Mr. Mosbaugh.

Mr. Mosbaugh's actions have been litigated before the Department of Labor. However, the facts here are uncontroverted. While in a senior plant management position at Plant Vogtle, Mr. Mosbaugh ignored the trust placed in him by his fellow workers and destroyed the open, candid and free flowing communicative environment critical to safely operating a nuclear plant. Mr. Mosbaugh began a six-month long, covert operation in which he surreptitiously and continuously taped conversations with virtually every person with whom he came into contact. He eavesdropped, he pilfered files in co-workers' desks and offices, and, in Georgia Power's opinion, engaged in illegal recording of conversations to which he was not a party.

He taped conversations with secretaries, peers and subordinates who have never been the targets of his claims. Moreover, he surreptitiously taped conversations with NRC officials, with no apparent reason and, Georgia Power contends, in violation of the spirit of NRC policies.

The complete record of the DOL proceedings and the NRC filings by Mr. Mosbaugh details a disturbing pattern of behavior on the part of Mr. Mosbaugh. It speaks volumes on the highly questionable motivations for his conduct. As has now been stated in a Recommended Order before the Secretary of Labor, such

conduct raises grave doubts about Mr. Mosbaugh's claims of illegal discrimination. Georgia Power submits that the conduct also raises serious questions as to the credibility of Mr. Mosbaugh's pursuit of safety concerns.

One of Mr. Mosbaugh's claimed rationalizations for taping was to prove retaliatory and illegal conduct by the Company. However, despite hundreds of hours of taping, Mr. Mosbaugh has never identified any tape which supports his claim of illegal discrimination. After six months of "undercover" investigation, Mr. Mosbaugh could prove only that he had engaged in a sordid pattern of duplicitous and egregious conduct designed to service some personal goal.

Mr. Mosbaugh says he first filed concerns with the NRC in January, 1990. And he says he entered into a Confidentiality Agreement from the NRC on June 14, 1990. Recent discovery in litigation has told us that he regularly and confidentially met with NRC investigators but he always withheld his tape recordings. He never told the NRC about the taping, even after the NRC asked him to wear a wiretap. When the Department of Labor investigated his claims of retaliation and asked if he had additional evidence, he withheld his secret tapes. The first time Georgia Power, the NRC or the Department of Labor learned of the tapes was in September, 1990 -- after an administrative law judge ordered him to produce them.

Most disturbing, however, is what Mr. Mosbaugh planned on not doing with the tapes. Despite his claimed concerns for the safe operation of Plant Vogtle, and his contention that criminal conduct has taken place, we now know Mr. Mosbaugh would trade his concerns for money. Prior to the filing of his first DOL claim in early June, 1990 (which he later dismissed), Mr. Mosbaugh, through his attorney, offered to "get out of the Company's hair" for $445,000. In exchange, his concerns would be submitted to the Company rather than the NRC, and Mr. Mosbaugh would forego filing his DOL complaint, and would not go to the NRC. If any single fact clearly distinguishes Mr. Mosbaugh from the other employees in the nuclear industry, including other "whistleblowers," it is Mr. Mosbaugh's repeated abuse of his employer, fellow employees, the NRC and Section 211 for purposes of personal financial gain. A question that keeps recurring to me is, "if he truly held safety concerns, would he swap cash for safety?"

STATEMENT
SUBMITTED BY

THE OFFICE OF THE INSPECTOR GENERAL
THE UNITED STATES NUCLEAR REGULATORY COMMISSION

TO THE

SUBCOMMITTEE ON CLEAN AIR AND NUCLEAR REGULATION
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

CONCERNING
THE NRC RESPONSE TO WHISTLEBLOWER
RETALIATION COMPLAINTS

DAVID C. WILLIAMS
INSPECTOR GENERAL

INTRODUCTION

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE, I AM PLEASED FOR THIS OPPORTUNITY TO APPEAR BEFORE YOU TODAY TO DISCUSS OUR JULY 9, 1993, INSPECTION REPORT, ENTITLED, "NRC RESPONSE TO WHISTLEBLOWER RETALIATION COMPLAINTS." OUR INSPECTION, CONDUCTED AT YOUR REQUEST, DISCUSSES THE NRC PROCESS FOR HANDLING ALLEGATIONS OF RETALIATION AGAINST WHISTLEBLOWERS WHO REPORT HEALTH AND SAFETY ISSUES TO THEIR MANAGEMENT OR THE NRC.

OUR INSPECTION WAS INITIATED IN 1992 BASED ON THE RECEIPT OF SERIOUS COMPLAINTS FROM CURRENT AND FORMER NUCLEAR LICENSEE EMPLOYEES. THE PURPOSE OF OUR INSPECTION WAS TO EXAMINE AND BETTER UNDERSTAND THE NATURE OF THE COMPLAINTS AND THE MAGNITUDE OF THE PROBLEM. THE INSPECTION DISCLOSED SUBSTANTIAL DISSATISFACTION AMONG THE ALLEGERS AS WELL AS MANY NRC STAFF INVOLVED WITH THE PROCESS. THE NRC PRACTICE OF DELAYING ACTION UNTIL THE DEPARTMENT OF LABOR (DOL) CONCLUDES ITS PROCEEDINGS CONTRIBUTES TO THE UNTIMELY RESOLUTION OF WHISTLEBLOWERS' COMPLAINTS. THIS PROCESS ESSENTIALLY LEAVES THE WHISTLEBLOWERS WITH A FEELING OF BEING

LEFT "OUT IN THE COLD." THIS CAN RESULT IN A "CHILLING EFFECT" FOR BOTH WHISTLEBLOWERS AND CO-WORKERS WHO MAY HAVE ADDITIONAL SAFETY CONCERNS TO REPORT. THESE FINDINGS SUGGEST THE NEED FOR SUBSTANTIAL ADDITIONAL WORK BY THE COMMISSION AND MY OFFICE TO RECONSIDER AND ATTEMPT TO IMPROVE THE MANNER IN WHICH WE ADDRESS WHISTLEBLOWER RETALIATION COMPLAINTS IN THE NUCLEAR INDUSTRY.

BACKGROUND

THE NRC HAS RESPONSIBILITY FOR REGULATING THE OPERATION OF 112 LICENSED NUCLEAR POWER PLANTS AND MORE THAN 8,000 MATERIALS LICENSEES. THE MAGNITUDE OF THE LICENSED ACTIVITIES IS SO EXTENSIVE THAT THE NRC CAN INSPECT ONLY A FRACTION OF THEM. THEREFORE, THE NRC RELIES ON LICENSEE AND CONTRACTOR EMPLOYEES TO REPORT SAFETY CONCERNS. IF EMPLOYEES ARE SUBJECTED TO RETALIATION BY THEIR EMPLOYERS FOR REPORTING SAFETY CONCERNS, THERE IS A POTENTIAL "CHILLING EFFECT" WHICH HAS SERIOUS HEALTH AND SAFETY IMPLICATIONS.

THE NRC DEVELOPED REGULATIONS DESIGNED TO PROTECT WHISTLEBLOWERS FROM RETALIATION. BOTH THE NRC AND DOL HAVE

RESPONSIBILITIES IN THIS AREA, AND ALTHOUGH THE NRC CAN INITIATE AN INVESTIGATION AT ANY TIME DURING THE DOL PROCESS, THE AGENCIES AGREED IN A 1982 MEMORANDUM OF UNDERSTANDING THAT THE NRC WOULD NOT NORMALLY CONDUCT A PARALLEL INVESTIGATION. NRC REGULATIONS AND FEDERAL STATUTES ALLOW ENFORCEMENT ACTIONS AGAINST LICENSEES WHICH COULD INCLUDE DENYING, REVOKING, OR SUSPENDING A LICENSE; IMPOSING VARIOUS CIVIL PENALTIES; AND INITIATING CRIMINAL PPROCEEDINGS. WHILE THIS NRC ENFORCEMENT AUTHORITY IS DIRECTED AT THE LICENSEE, THE DOL AUTHORITY IS DIRECTED TOWARD RESTORING AN EMPLOYEE'S JOB STATUS WHEN APPROPRIATE.

BETWEEN OCTOBER 1988 AND APRIL 1993, THE NRC RECEIVED A TOTAL OF 609 RETALIATION COMPLAINTS AND INITIATED FULL-SCALE INVESTIGATIONS FOR 44 OF THEM. THREE HUNDRED-SIXTY NINE OF THESE COMPLAINTS WERE ALSO FILED WITH DOL. BASED ON THE COMPLAINTS RECEIVED, SEVEN NRC ENFORCEMENT ACTIONS WERE TAKEN AGAINST LICENSEES DURING THIS PERIOD; HOWEVER, NO INDIVIDUALS HAVE BEEN PROSECUTED CRIMINALLY. THE TWO CHARTS ON DISPLAY BEFORE YOU PROVIDE A DESCRIPTION OF THE NRC AND DOL RESOLUTION OF THE RETALIATION COMPLAINTS.

ISSUES

BASED ON OUR INTERVIEWS, SEVERAL ISSUES SURFACED THAT WERE COMMON TO THE COMPLAINTS RECEIVED FROM WHISTLEBLOWERS, WHICH I WOULD LIKE TO DESCRIBE.

FIRST, I WOULD LIKE TO DISCUSS THE PERCEIVED LACK OF TIMELY NRC RESPONSE TO RETALIATION COMPLAINTS. WHISTLEBLOWERS FELT THAT THE GOVERNMENT DOES LITTLE TO PROTECT THEM FROM RETALIATION OR TO INVESTIGATE THEIR ALLEGATIONS OF RETALIATION IN A TIMELY MANNER. THEY FELT ABANDONED BECAUSE THE NRC WAITED FOR DOL TO DETERMINE WHETHER THE WHISTLEBLOWERS WERE SUBJECTED TO RETALIATION. A NUMBER OF NRC STAFF INTERVIEWED BY OIG AGREED THAT A LACK OF AGGRESSIVE AND TIMELY NRC RESPONSE TO COMPLAINTS OF RETALIATION CAN SEND A MESSAGE TO WHISTLEBLOWERS THAT RETALIATION COMPLAINTS ARE NOT A PRIORITY MATTER. FURTHER, THE LICENSEES RECEIVE THE MESSAGE THAT ACTS OF RETALIATION WILL NOT BE MET WITH FIRM AND RAPID RESPONSE FROM THE NRC. THIS LACK OF TIMELY ACTION RESULTS IN A "CHILLING EFFECT" FOR WHISTLEBLOWERS AND THEIR CO-WORKERS.

NEXT LET ME TURN TO THE QUESTIONABLE IMPACT OF NRC'S "CHILLING EFFECT" LETTER. WHEN THE DOL FINDS FOR AN ALLEGER IN A RETALIATION CASE, THE NRC SENDS THE LICENSEE A "CHILLING EFFECT" LETTER. THE LICENSEE MUST RESPOND TO THIS LETTER AND EXPLAIN ITS PROGRAM TO ENSURE THAT RETALIATORY ACTS HAVE NOT HAD A "CHILLING EFFECT" ON OTHER EMPLOYEES. SEVERAL NRC STAFF FELT THE LETTER WAS INEFFECTIVE AND HAD NO DETERRENT EFFECT FOR LICENSEES. ALSO, THE STAFF TOLD US THAT THE NRC DID NOT ROUTINELY VERIFY REPRESENTATIONS IN LICENSEES' RESPONSES TO "CHILLING EFFECT" LETTERS.

THE NEXT MATTER I WOULD LIKE TO DISCUSS INVOLVES THE WHISTLEBLOWERS BELIEF THAT THEIR IDENTITIES WERE BEING COMPROMISED WHEN THEY FOLLOWED THE VERY PROCEDURES THE NRC HAS IN PLACE TO PROTECT THEIR IDENTITIES. THE NRC ENCOURAGES LICENSEE EMPLOYEES TO FIRST ATTEMPT TO RESOLVE THEIR TECHNICAL CONCERNS WITH LICENSEE MANAGEMENT. IF THIS ATTEMPT IS UNSUCCESSFUL, THE EMPLOYEE IS ENCOURAGED TO REPORT THE CONCERNS TO THE NRC. IF AN EMPLOYEE FOLLOWS THIS PATH, THE EMPLOYEE IS IDENTIFIED BY MANAGEMENT AS BEING CONCERNED ABOUT PARTICULAR SAFETY ISSUES. SHOULD THE EMPLOYEE REPORT THESE TECHNICAL ISSUES TO THE NRC AND THE

NRC INSPECTS THESE SAME ISSUES, THE EMPLOYEE COULD BE EASILY IDENTIFIED. DISCLOSURE OF AN ALLEGER'S IDENTITY THROUGH THIS PROCESS IS KNOWN AS "FINGERPRINTING."

SUGGESTIONS FOR CHANGE

THE INDIVIDUALS WE INTERVIEWED OFFERED SUGGESTIONS FOR CHANGING THE AGENCY'S POLICY FOR RESPONDING TO WHISTLEBLOWER COMPLAINTS. ONE IDEA OFFERED WAS FOR THE NRC TO VIGOROUSLY USE THE "WRONGDOER RULE." THIS NRC REGULATION ALLOWS THE NRC TO ORDER THAT A PERSON BE REMOVED FROM LICENSED ACTIVITIES. SUBSTANTIAL CRITICISM WAS DIRECTED AT THE NRC PRACTICE OF PENALIZING ONLY THE CORPORATE ENTITY FOR RETALIATION. ALLEGERS MAINTAINED THAT INDIVIDUAL MANAGERS RESPONSIBLE FOR WILLFUL ACTS OF RETALIATION WERE NOT PENALIZED AND OFTEN CONTINUED WORKING IN THE NUCLEAR INDUSTRY. ATTORNEYS REPRESENTING BOTH ALLEGERS AND INDUSTRY LICENSEES CONCURRED THAT USE OF THE "WRONGDOER RULE" IS A POTENTIALLY EFFECTIVE MEANS OF ASSIGNING RESPONSIBILITY TO INDIVIDUALS FOUND GUILTY OF WILLFUL MISCONDUCT.

ANOTHER SUGGESTION FOCUSED ON PROTECTION FOR ACTIVELY-EMPLOYED ALLEGERS DURING NRC INVESTIGATIONS. MANY OF THOSE INTERVIEWED BELIEVED THE NRC COULD ORDER LICENSEES TO TEMPORARILY PROTECT AN ALLEGER'S EMPLOYMENT STATUS UNTIL THE NRC COMPLETED ITS INVESTIGATION. THIS PRACTICE COULD BE ABUSED BY EMPLOYEES WISHING TO AVOID ADVERSE PERSONNEL ACTIONS OR A SCHEDULED LAYOFF. HOWEVER, THIS OPTION COULD BE CONSIDERED WHEN THESE IMPROPER MOTIVES CAN BE RULED OUT.

ON ANOTHER MATTER, THERE WAS AN OVERALL BELIEF AMONG THOSE INDIVIDUALS INTERVIEWED BY MY STAFF THAT THE CURRENT LEVEL OF MONETARY PENALTIES HAS LITTLE DETERRENCE FOR LICENSEES; THEREFORE, THEY SUGGESTED INCREASED CIVIL PENALTIES AND STRONGER ENFORCEMENT ACTIONS. ALTHOUGH SUBSTANTIALLY LARGER MONETARY FINES ARE AN ALTERNATIVE, SOME OF THOSE INTERVIEWED EVEN QUESTIONED THE IMPACT THE LARGER PENALTIES WOULD HAVE. THERE WAS ALSO MIXED OPINION ON THE IMPACT OF NEGATIVE PUBLICITY ASSOCIATED WITH AN NRC ENFORCEMENT ACTION. NEARLY ALL AGREED HOWEVER, THAT THE NRC ORDERING THE SHUTDOWN OF A NUCLEAR POWER PLANT OR REVOKING A LICENSE WOULD BE THE MOST SIGNIFICANT NON-CRIMINAL PENALTY TO IMPOSE ON LICENSEES. THESE ARE THE MOST SEVERE NON-CRIMINAL

PENALTIES AVAILABLE TO THE NRC. MANY OF THE INTERVIEWEES MAINTAINED HOWEVER, THAT THESE WERE THE ONLY PENALTIES WHICH WOULD CAUSE LICENSEES TO CONSIDER RETALIATION TO BE A SERIOUS VIOLATION.

LASTLY THERE WAS A SUBSTANTIAL CALL FOR THE NRC TO ASSUME FULL INVESTIGATIVE RESPONSIBILITY FOR RETALIATION COMPLAINTS. MANY OF THE INDIVIDUALS INTERVIEWED BELIEVE THAT IF THE NRC ASSUMED FULL RESPONSIBILITY FOR INVESTIGATING AND ADJUDICATING RETALIATORY COMPLAINTS THERE WOULD BE A POSITIVE IMPACT IN REDUCING THE "CHILLING EFFECT." THEY BELIEVE THAT TIMELY INVESTIGATIONS AND ENFORCEMENT ACTIONS BY THE NRC WILL PROVIDE LICENSEES WITH A STRONG MESSAGE THAT RETALIATION WILL NOT BE TOLERATED. ALSO, LICENSEE EMPLOYEES WILL KNOW THAT THE NRC CAN PROVIDE PROTECTION TO THOSE EMPLOYEES WHO COOPERATE WITH THE NRC.

IN CONCLUSION, WE FOUND THAT THE NRC PROCESS FOR HANDLING ALLEGATIONS OF RETALIATION DOES NOT PROVIDE AN ADEQUATE LEVEL OF PROTECTION FOR WHISTLEBLOWERS. OUR INSPECTION DISCLOSED SUBSTANTIAL DISSATISFACTION WITH THE PROCESS AMONG THE ALLEGERS AND NUMEROUS NRC STAFF WE INTERVIEWED. THE NRC

STAFF ACKNOWLEDGED THAT THE CURRENT NRC PRACTICE OF AWAITING DOL DECISIONS DOES NOT PROVIDE FOR TIMELY RESOLUTION OF ALLEGATIONS, AND THE ASSOCIATED DELAY CAN SEND A MESSAGE THAT RETALIATION COMPLAINTS ARE NOT A PRIORITY CONCERN. THIS PERCEPTION CAN RESULT IN A "CHILLING EFFECT" FOR WHISTLEBLOWERS AND THEIR CO-WORKERS WHO MAY HAVE ADDITIONAL SAFETY CONCERNS TO REPORT TO LICENSEE MANAGEMENT OR TO THE NRC.

MR. CHAIRMAN, LET ME THANK YOU AND THE SUBCOMMITTEE FOR YOUR FOCUS ON THIS PROBLEM AND INVITE ANY QUESTIONS REGARDING OUR WORK THAT YOU MAY HAVE.

OFFICE OF THE INSPECTOR GENERAL

US NUCLEAR

REGULATORY COMMISSION

NRC RESPONSE TO WHISTLEBLOWER RETALIATION COMPLAINTS

OIG/93MIR-2 July 13, 1993

MANAGEMENT IMPLICATIONS REPORT

INTRODUCTION

In June 1993, Chairman Selin was briefed on the preliminary results of the Office of the Inspector General's (OIG) inspection of the NRC's response to whistleblower retaliation complaints. At the conclusion of the briefing, Chairman Selin requested that the Inspector General provide additional information relating to NRC procedures for responding to whistleblowers. Questions provided by the Commissioners and Congressional staff are also addressed in this report.

QUESTIONS

1) Does the NRC conduct an adequate number of retaliation investigations?

During a 4-1/2 year period, the NRC received 609 retaliation complaints which resulted in 44 full-scale NRC investigations. This seemingly low number of NRC investigations may support the statements of allegers, attorneys who represent allegers, and certain NRC staff who told OIG that the NRC was not responding adequately to whistleblower complaints. While this statistical information created questions for certain reviewers, our inspection did not examine whether the NRC conducted an appropriate number of whistleblower investigations. For the OIG to fully address this question, a separate examination will be necessary.

The OIG plans to conduct this examination which will include a review of the NRC decision-making process for addressing retaliation complaints. This examination will involve those complaints filed with both the NRC and DOL, as well as, those filed only with the NRC. Specifically, we want to know how the NRC Office of Investigations decides which complaints to investigate, the criteria used to make these decisions, and how these decisions are documented. An important element in this examination will be a comparison of current NRC resources to those required for additional investigative responsibilities. The OIG wants to be able to assure the Commission that any NRC decision not to investigate retaliation complaints is both reasoned and thoroughly documented.

2) Does the NRC place too much reliance on DOL investigations, and if so, what is the impact?

The 16 whistleblowers interviewed for our inspection complained that the time required by DOL to review their cases was unacceptable. They further criticized the NRC for contributing to a "chilling effect" for their co-workers by waiting for DOL to conclude its proceedings before considering whether to

investigate their complaints and/or take enforcement actions. Essentially, the NRC was relying too heavily on DOL to determine whether retaliation occurred. The whistleblowers also complained about the extended time taken by DOL to conclude its review once a DOL Area Director's finding was appealed.

Potential problems with this arrangement begin at the outset of the DOL process when Compliance Officers investigate complaints. DOL Compliance Officers initially attempt to conciliate complaints as opposed to investigating them. Because Compliance Officers are urged to complete their investigations within 30 days, conciliation efforts often leave little time for investigating what may be complicated retaliation cases. Some cases are "completed" after a 4- or 5-day investigation by DOL. Thus, the thoroughness of these investigations can be questionable. Those NRC staff interviewed by OIG are aware of this potential shortcoming. Further, NRC personnel do not normally review Compliance Officers' investigative reports. Nevertheless, the NRC routinely allows DOL Area Director findings to serve as the deciding factor for any subsequent NRC investigations of retaliation.

We found that in those cases where allegers do not appeal adverse DOL Area Directors' findings, the NRC will usually "close out" their files on the retaliation allegations. This action assumes that because an alleger does not challenge a DOL finding, the alleger has no case; and there were no violations of employee protection requirements. This assumption is flawed, however, since it overlooks other reasons for an alleger not to appeal. Among these are 1) failure to meet the appeal deadline, 2) potentially high costs associated with an appeal, 3) allegers accepting other employment, and 4) allegers appealing in another judicial venue. For these reasons and possibly others, the absence of an appeal does not automatically presume that no "chilling effect" exists at licensee facilities.

3) <u>Are current NRC resources adequate to conduct additional investigations of retaliation complaints?</u>

Certain NRC staff maintained that the most effective way of reducing a potential "chilling effect" is earlier NRC investigations. One result of this earlier involvement might be that nuclear industry employees would be more likely to report safety concerns without fear of retaliation. Earlier involvement would also send a message to licensees that retaliation is a high priority matter which will not be tolerated by the NRC. As discussed previously, earlier involvement possibly could impact on NRC resources.

There are interim steps the NRC can take that are not resource-intensive. NRC investigators could routinely review DOL

narrative reports to determine the adequacy of a Compliance Officer's investigation. If necessary, a preliminary investigative evaluation can follow this review. The staff can also personally interview licensee managers instead of relying upon written responses to "Chilling Effect" letters. The staff could focus its attention on "problem" licensees who are associated with an unusually large number of retaliation complaints.

4) Would early NRC enforcement actions be affected by on-going DOL proceedings?

In March 1992, the Commission modified NRC policy to allow the NRC to propose an enforcement action based on an Administrative Law Judge (ALJ) recommended decision favoring a whistleblower. However, no civil penalty would be imposed until the Secretary of Labor ruled. Should an ALJ decision be overturned by the Secretary, the NRC will withdraw its proposed penalty.

The NRC could continue pursuing a proposed civil penalty after an ALJ decision is overturned. This can occur when the NRC Office of Investigations (OI) conducts an independent investigation which sustains a retaliation complaint. In such an instance, the NRC would impose the penalty regardless of the Secretary's ruling. In addition, if the Secretary overturned an ALJ recommended decision based on a procedural matter, the NRC would seek collection of a penalty since the merits of the ALJ recommended decision were not affected.

5) What is the Office of Enforcement criteria for measuring timeliness of enforcement actions? Is eight months acceptable?

The Office of Enforcement (OE) established timeliness goals for processing enforcement actions. These goals are applied to regional and headquarters OE staff. Regional offices are to prepare enforcement packages for submittal to headquarters within 45 days. NRC Headquarters review and comments are to be completed within 21 days at which time the packages are returned to the regions for enforcement conferences with licensees. Approximately two months is the targeted time for an enforcement action to be completed.

An enforcement action requiring eight months would likely involve a complex case requiring considerable staff effort. A recent retaliation case at Northeast Utilities in Connecticut is such an example, according to the NRC staff. Any further comment on this matter by the OIG would require an extensive review of the OE program.

6) <u>What was the total number of technical and other allegations reported to the NRC during this 4-1/2 year period?</u>

-- 3,875.

7) <u>What percentage of the 609 retaliation complaints were against reactor licensees? What percentage were against material licensees? What percentage were against others, such as vendors?</u>

-- 83% Reactor Licensees

-- 9% Materials Licensees

-- 8% Other

8) <u>What percentage of the 44 OI investigations involved reactor licensees and materials licensees?</u>

-- 90% Reactor Licensees

-- 10% Materials Licensees

9) <u>Were the 609 retaliation complaints distributed evenly among the licensees?</u>

--NRC data indicate that just over 50% of the retaliation complaints originated at nuclear power reactor facilities owned by the following five licensees.

-Tennessee Valley Authority, Licensee for Browns Ferry Units 1, 2, & 3; Sequoyah Units 1 & 2; and Watts Bar Units 1 & 2. (152 complaints)

-Arizona Public Service, Licensee for Palo Verde Nuclear Generating Station Units 1, 2, & 3. (72 complaints)

-Northeast Nuclear Energy Company, Licensee for Millstone Units 1, 2, & 3. (50 complaints)

-Texas Utilities Electric Company, Licensee for Comanche Peak Units 1 & 2. (27 complaints)

-Houston Lighting & Power Company, Licensee for South Texas Project Units 1 & 2. (13 complaints)

10) <u>How many individuals were responsible for reporting the 609 retaliation complaints?</u>

-- Approximately 470

Office of The
Inspector General
U.S. NUCLEAR REGULATORY COMMISSION

INSPECTION REPORT

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555

July 9, 1993

OFFICE OF THE
INSPECTOR GENERAL

MEMORANDUM FOR: The Chairman
Commissioner Rogers
Commissioner Remick
Commissioner de Planque

FROM: David C. Williams
Inspector General

SUBJECT: INSPECTION OF THE NRC RESPONSE TO WHISTLEBLOWER RETALIATION COMPLAINTS

The attached Office of the Inspector General (OIG) Inspection Report addresses the staff's handling of retaliation complaints received from whistleblowers employed by U.S. Nuclear Regulatory Commission (NRC) licensees. OIG received allegations from whistleblowers related to the inadequacy of government efforts and procedures to sufficiently protect them from retaliation when they voiced health and safety concerns. Senator Joseph I. Lieberman's staff discussed the matter with our office after he received some of the same complaints.

This inspection is the first step in addressing this issue. The inspection focuses on the nature and magnitude of the problem. Our work to survey and examine this issue found widespread dissatisfaction with the government's current procedures and efforts. The individuals we interviewed presented us with ideas for improving our efforts to address this widely-perceived problem.

The inspection did not find that the objective of government efforts or procedures was to abandon or bring harm to whistleblowers. We are concerned, though, that the inadvertent effect of the government's approach may be causing just such harm. Our concern about this was heightened by the May 19, 1993, audit report (Report No: 17-93-009-01-010) issued by the Department of Labor, Office of the Inspector General entitled "Audit of the Office of Administrative Appeals." This report described major deficiencies in the Office of Administrative Appeals that constituted a denial of due process to parties

awaiting final decisions from the Secretary of Labor. Many NRC whistleblower cases are ultimately handled by this office.

We felt that it was important to include anecdotal information as well as statistical and procedural data in our report. I found the anecdotal information easy to identify with and believe it will help the Commission to understand the compelling nature of this problem.

As work progressed on this inspection, I had the opportunity to discuss it with each Commissioner and know of your collective interest. I am also aware that the issue is complex, and I know that certain changes carry with them attendant problems. I am sure that the NRC staff is prepared to support your efforts in examining this issue and possible improvements. I want to assure you of my office's continued interest and availability to support you, as well.

One area of the report which our office would like to better understand is how 609 complaints resulted in only 44 investigations and seven enforcement actions during a 4-1/2 year period. Of the 609 complaints, 369 were filed both with the Department of Labor (DOL) and the NRC. The remaining 240 were filed only with the NRC. I would like to more clearly understand how the NRC processes these two groups of complaints and evaluates those filed with DOL. I want to be able to assure the Commission that the complaints are being properly analyzed and that the decision for declining an investigation is reasoned. If this area needs changing my office will advise you.

If you have any questions regarding the OIG's report, I will be happy to meet with you at your convenience.

Attachment:
Report of Inspection

cc: J. Taylor, EDO

OFFICE OF THE INSPECTOR GENERAL INSPECTION REPORT

NRC RESPONSE TO WHISTLEBLOWER RETALIATION COMPLAINTS

CASE NO. 92-01N

Harold T. Lossett 7/9/93
INSPECTOR DATE

Jack W. Taylor 7/9/93
TEAM LEADER DATE

Leo F. Norton 7/9/93
ASSISTANT INSPECTOR GENERAL FOR INVESTIGATIONS DATE

EXECUTIVE SUMMARY

The Office of the Inspector General (OIG) received a number of complaints from licensee employees. The complaints focused on the inadequacy of U.S Nuclear Regulatory Commission (NRC) and Department of Labor (DOL) procedures to provide protection for licensee whistleblowers who experienced intimidation and harassment from their employers after voicing health and safety concerns. Senator Joseph I. Lieberman also became aware of some of these complaints, and his staff discussed the issue with our office. The OIG initiated an inspection in 1992 to examine and better understand the nature and magnitude of this problem. During the inspection, ideas for addressing the problem were expressed to us which we have included in our report.

BACKGROUND

The NRC is responsible for regulating the operation of nuclear power plants and the activities of nuclear materials licensees to protect public health and safety. Due to the magnitude of licensed activities, the NRC can inspect only a fraction of them. Because of this, the NRC relies, in part, on licensee and contractor employees to report safety concerns to both the licensee and the NRC. If employees are subjected to retaliation for reporting safety concerns to licensee management or to the NRC, there are potentially serious negative consequences.

The NRC developed regulations that are designed to protect from retaliation employees who cooperate with the NRC. Because both DOL and the NRC share responsibilities in the employee protection area, the two agencies entered into a Memorandum of Understanding in October 1982. Although the NRC can initiate an investigation at any time during the DOL process, working arrangements agreed to by both agencies provided that the NRC would not normally conduct a parallel investigation.

The NRC regulates 112 licensed nuclear power reactors with more than 100,000 employees, and more than 8,000 materials licensees and their employees. Between October 1988 and April 1993, the NRC received 609 retaliation complaints, of which 369 were also filed with DOL. From the 609 complaints, the NRC initiated 44 retaliation investigations and completed 31. Eight of these 31 completed investigations were of complaints that were also investigated by DOL. The remaining 23 completed investigations were conducted in response to the 240 complaints that were filed only with the NRC.

During this same 4-1/2 year period, the NRC Office of Enforcement took seven enforcement actions involving 10 of the 609 reported retaliation complaints. Three of the NRC enforcement actions were taken against nuclear power reactor licensees. Two of these three enforcement actions resulted in civil penalties being proposed. The proposed penalties were for $25,000 and $130,000, and they are still pending. The third enforcement action resulted in a Notice of Violation without a civil penalty.

ISSUES

In conducting this inspection, the OIG interviewed 16 whistleblowers who identified issues in the NRC process for responding to retaliation complaints that, in their opinion, contributed significantly to a "chilling effect" for the whistleblowers and their co-workers. The issues mentioned were 1) the lack of a timely NRC response to retaliation complaints, 2) the questionable impact of NRC's "Chilling Effect" letter, and 3) the disclosure of whistleblowers' identities through the NRC inspection process.

The whistleblowers told OIG that they felt the NRC does little to protect them from retaliation or to investigate their allegations of retaliation in a timely manner. They described a feeling of abandonment created by the NRC's willingness to "sit on the sidelines" and allow DOL to determine whether the whistleblowers were subjected to retaliation. These whistleblowers believe that the NRC's lack of effort to investigate retaliation complaints results in a "chilling effect" for them and their co-workers.

The NRC staff had varying opinions about the usefulness of the "Chilling Effect" letter sent to licensees. Several felt it was ineffective and had no deterrent effect for licensees. The staff also told OIG that the NRC did not routinely verify representations in licensees' responses to "Chilling Effect" letters."

Although the NRC has procedures in place to protect the identity of allegers who report safety concerns, a number of allegers informed OIG that they believed the NRC compromised their identities to their employers through the same procedures. The disclosure of an alleger's identity can occur through a process known as "fingerprinting."

SUGGESTIONS FOR CHANGE

During this inspection, OIG received numerous suggestions for changing the agency's policy for responding to whistleblower complaints from several sources including the NRC staff. The NRC staff interviewed by OIG emphasized that acceptance of additional investigative responsibilities will require either a shifting of work priorities, or the NRC will need to request additional investigative and enforcement resources. There were suggestions and comments which included the following:

Use of the "Wrongdoer Rule"

Significant criticism was directed at the NRC practice of penalizing only licensees for retaliation. Allegers maintained that individual managers responsible for willful acts of retaliation were not penalized and often continued working in the nuclear industry. This rule allows the NRC to order the removal of an employee from licensed activities.

Increased civil penalties and other enforcement actions

The allegers and numerous NRC staff interviewed by the OIG, and certain attorneys representing allegers, stated that the current monetary level of civil penalties has little deterrence for licensees. Substantially larger monetary fines are an alternative, but many of those interviewed questioned the impact of a larger civil penalty. However, nearly all interviewees agreed that NRC ordering the shutdown of a nuclear power plant or revoking a license would be the most significant penalty to impose on licensees. Many of the interviewees maintained that these were the only penalties which would cause licensees to consider retaliation to be a serious violation.

NRC investigative interviews versus "Chilling Effect" letter

When a DOL Area Director finds that an alleger was retaliated against, the NRC sends the licensee a "Chilling Effect" letter. The purpose of the letter is to obtain an explanation of what the licensee has done and plans to do to ensure that the retaliatory act does not have a "chilling effect" on other employees. Allegers and several of the NRC staff OIG interviewed agreed that the NRC places too much reliance on unverified licensee responses to the "Chilling Effect" letter. They maintained that a preliminary inquiry by NRC investigators would be more effective in determining whether a potential "chilling effect" exists. Specifically, the investigators could obtain first-hand explanations about alleged retaliation, review pertinent documentation and conduct interviews of licensee managers.

Protection for actively-employed allegers during NRC investigation

Allegers and a number of NRC staff suggested that the NRC could order licensees to temporarily protect an alleger's employment status. This protection would continue at least until the NRC had completed its own investigation of the alleged retaliation. Other NRC staff expressed concern that this practice could be easily abused by an employee with a frivolous complaint to avoid an adverse personnel action or a scheduled layoff. However, this option could be considered when these improper motives can be ruled out.

Full NRC investigative responsibility for retaliation

If the NRC assumed total responsibility for investigating and adjudicating retaliatory complaints reported by licensee employees, there would be a positive impact in reducing the "chilling effect," according to certain interviewees. The interviewees said that timely investigations and enforcement actions by the NRC will provide licensees with a message that retaliation will not be tolerated. Also, licensee employees will know that the NRC can provide protection to those employees who cooperate with the NRC. The interviewees recognized that this option would likely require additional NRC investigative resources or a reassessment of the system for determining investigative

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priorities. Further, the NRC would have to assess the resource impact that the assumption of the DOL adjudicating process would have on the agency.

FINDINGS

Based on the information developed during this inspection, we found that the NRC process for handling allegations of retaliation does not provide an adequate level of protection to allegers reporting safety concerns. Our inspection disclosed substantial dissatisfaction with the process among the allegers and numerous NRC staff we interviewed. The NRC staff acknowledged that the current NRC practice of awaiting DOL decisions does not provide for timely resolution of retaliation allegations. Such a delay can result in a "chilling effect" for whistleblowers and their co-workers who may have additional safety concerns to report to licensee management or to the NRC.

NRC staff, allegers, and attorneys representing allegers concurred that the lack of an aggressive and timely NRC response to complaints of retaliation sends a message to licensee management that the NRC does not consider retaliation to be a matter of serious concern. This perception can also result in a "chilling effect" for allegers and their co-workers.

The NRC staff had varying opinions about the usefulness of the NRC's "Chilling Effect" letter. However, several felt it was ineffective and had no deterrent effect for licensees.

A number of interviewees believe the NRC should penalize individual licensee employees responsible for retaliation. We found that the NRC has options available to deal with individuals responsible for retaliation. In addition to the Wrongdoer Rule, Title 42, United States Code 2273 provides criminal penalties for willful violations of the Atomic Energy Act.

BASIS AND SCOPE

The Office of the Inspector General (OIG) received a number of complaints from licensee employees. The complaints focused on the inadequacy of U.S. Nuclear Regulatory Commission (NRC) and Department of Labor (DOL) procedures to provide protection for licensee whistleblowers who experienced intimidation and harassment from their employers after voicing health and safety concerns. Senator Joseph I. Lieberman also became aware of some of these complaints, and his staff discussed the issue with our office. The OIG initiated an inspection in 1992 to examine and better understand the nature of the complaints and the magnitude of this problem. During the inspection, ideas for addressing the problem were expressed to us which we have included in our report.

This OIG inspection reviewed the NRC process for handling allegers, the implementing procedures for this process, and the allegation files associated with specific alleger cases. The OIG interviewed a total of 16 allegers in the five NRC regions. The OIG also interviewed 26 NRC staff to include the Allegation Coordinators, the Regional Legal Counsels, the Enforcement Officers, and the Field Office Directors of the Office of Investigations in each region. The Directors of the NRC Office of Enforcement and the NRC Office of Investigations were interviewed, and OIG obtained the views of attorneys representing both allegers and licensees.

The 16 whistleblowers OIG interviewed contacted the OIG directly with their complaints, or they were referred to OIG by others who were aware of the problems they were experiencing. The whistleblowers were interviewed with the objective of understanding their concerns with the government's handling of their retaliation complaints. While the allegers do not represent all whistleblowers, they did help us focus on the government policies and procedures that could impact negatively on the whistleblowers. Our inspection did not involve a comprehensive survey of all NRC allegers who filed retaliation complaints. Therefore, this report does not address the experiences and perceptions of the entire NRC whistleblower population.

BACKGROUND

The NRC has responsibility for regulating the operation of nuclear power plants and the activities of nuclear materials licensees to protect public health and safety. Although the NRC inspects and audits these licensees, the magnitude of licensed activities is so extensive that only a fraction of them can be inspected by the NRC. Because of this, the NRC relies, in part, on licensee and contractor employees to report safety concerns to both the licensee and the NRC. The NRC considers a properly-functioning licensee quality assurance program to be an integral part of the NRC's regulatory program. Essentially, employees must feel free to report concerns to their management or the NRC. If employees are subject to retaliation for reporting safety concerns to licensee management or to the NRC, there are potentially serious negative consequences. The NRC developed regulations that are designed to protect from retaliation employees who cooperate with the NRC.

Legislative and regulatory basis for employee protection

In 1978, Section 210 was added to the Energy Reorganization Act of 1974. This statute provided that no NRC licensee, licensee contractor, or subcontractor could discharge or otherwise discriminate against employees with respect to the terms and conditions of their employment because the employees participated in protected activities. Employees who alleged a violation under Section 210 could file a complaint with DOL. DOL was required to complete the investigation within 30 days, notify both parties to the complaint of the results, and order a remedy if appropriate. The DOL remedy could include an order to rehire the employee; provide back pay to the employee; promote the employee; and pay the employee's attorney fees.

In 1982 the NRC added new Employee Protection Sections to Title 10, Code of Federal Regulations (CFR). These provisions are reflected in 10 CFR parts 30.7, 40.7, 50.7, 60.9, 61.9, 70.7 and 72.10. These new rules adopted the basic statutory prohibition of retaliatory discrimination addressed in Section 210. These regulations further defined the protected activities related to providing the Commission with information about possible violations of NRC requirements that could affect the public health and safety. If the NRC determined through its own investigation or as the result of the DOL finding that an NRC licensee had committed a violation, the NRC could take enforcement action against the licensee. The NRC enforcement action could include denying, revoking, or suspending a license; imposing a civil penalty; or other enforcement action. While the NRC enforcement authority is directed at the licensee, the DOL authority is directed at restoring the employee's job status when appropriate.

The NRC's authority was further enhanced in 1992, when the Commission amended its regulations to make applicable the existing criminal penalty provisions of the Atomic Energy Act of 1954, as amended. The provisions made it illegal to willfully violate the Commission's regulations regarding retaliation. Specifically, Title 42, United States

Code, Section 2273 provides criminal penalties for willful violations of the Act by an individual director, officer, or employee of a firm licensed by the NRC. To date, there have been no prosecutions under this statute.

Because both DOL and the NRC share responsibilities in the employee protection area, the two agencies entered into a Memorandum of Understanding (MOU) in October 1982. The MOU required the DOL to promptly notify the NRC of any complaint filed pursuant to Section 210 that involved NRC licensees. Additionally, DOL was required to promptly provide the NRC with copies of an alleger's complaint and advise the NRC of any actions taken with respect to the complaint. In turn, the NRC agreed to assist DOL in obtaining access to licensed facilities. Working arrangements agreed to by both agencies provided that the NRC would not normally conduct a parallel investigation of retaliation.

In 1986, the NRC reassessed the regulations, policies, and procedures for handling alleged violations of the Employee Protection provisions of 10 CFR. One issue addressed during this reassessment involved determining when the NRC should investigate incidents of alleged retaliation. The NRC chose to continue its practice of delaying its own investigations of retaliation until DOL had concluded its investigations and proceedings.

Energy Policy Act of 1992

In 1992, the Congress was considering two bills, S. 2166 and H.R. 776, that would establish a national energy strategy. On June 26, 1992, the NRC wrote the Honorable John D. Dingell, Chairman, House Committee on Energy and Commerce, to present its views on the bills. One of the provisions with which the NRC expressed "substantial" concern related to whistleblower protection. The NRC's detailed response to subsection 3004(h) of H.R. 776, which included the proposed changes to the whistleblower protection provisions stated:

> **We strongly object to subsection 3004(h) of H.R. 776, which would: (1) impose an independent duty on the NRC to investigate whistleblower allegations, regardless of the pendency of a Department of Labor (DOL) investigation or federal court proceeding. The NRC would be directed not to delay any investigation during the pendency of a DOL investigation; and (2) bar the Commission from considering a determination by the DOL that a violation of section 210 had not occurred in determining whether any violation of that section or the Atomic Energy Act had occurred.**

Further, the NRC response continued with the statement that:

> **The approach contained in section 3004(h) is unsatisfactory because it will mandate unnecessary and costly NRC duplication of DOL efforts, particularly if**

> **we are precluded from considering a DOL finding rejecting the Whistleblower's claims. Without being given additional resources to accommodate this new workload, NRC investigatory resources will necessarily have to be diverted from other efforts.**

The final legislation did not include the proposed changes.

Both the Senate and House bills contained a provision for increasing from 30 days to one year the time allowed for an alleger to file a claim with DOL under Section 210. The NRC expressed support for a six-month statute of limitations rather than one year because the "longer investigations of complaints are delayed, the more difficult investigations become." The six-month limit was ultimately accepted and included in the legislation which became effective in October 1992. Also at this time, Section 210 was redesignated Section 211.

DOL Section 211 complaint processing procedures

The DOL Wage and Hour Division closes more than 65,000 cases annually, a small portion of which are filed by employees of NRC licensees. When an alleger complains of retaliation to DOL under Section 211 of the Energy Reorganization Act, an investigation is assigned to a local DOL Compliance Officer within the Wage and Hour Division.

The DOL staff notifies the appropriate NRC regional office that a Section 211 complaint has been received from an employee of an NRC licensed facility. The Compliance Officer initially attempts to attain a settlement between the alleger and the licensee. If this is unsuccessful, the officer completes the investigation and issues a Narrative Report to the DOL Area Director. The Section 211 requirement that the Narrative Report be completed within 30 days is not always met. The Area Director will issue a finding which is subject to appeal. The DOL staff will notify the NRC of the Area Director's finding.

When an Area Director's finding is appealed, a hearing is scheduled before an Administrative Law Judge (ALJ). The ALJ decision is automatically forwarded to the Secretary of Labor for review. This entire investigation and review process can take 3-5 years to complete. In some cases, the process has taken longer than five years.

NRC process for handling reports of retaliation against allegers

NRC Management Directive 8.8, Management of Allegations, formerly NRC Manual Chapter 0517, addresses the need to promptly resolve technical concerns reported by allegers. This directive also acknowledges that allegations involving retaliatory actions against individuals reporting safety concerns may have public safety implications.

Specifically, co-workers who become aware of alleged retaliatory acts may be discouraged from reporting safety concerns of their own. This is referred to as a "chilling effect."

When an alleger contacts the NRC with an allegation involving retaliation, the alleger is informed that the complaint should also be filed with DOL if a remedy is sought. The NRC also advises the alleger of the reporting requirements under Section 211. If the alleger files with DOL, the DOL proceedings will be monitored by the NRC.

The NRC can investigate retaliation complaints at any time regardless of the status of the DOL proceedings. However, the NRC seldom initiates an investigation while DOL is involved in a retaliation case. If a DOL Area Director finds for a licensee and the alleger does not request an ALJ hearing, the NRC will normally close the case at that juncture. On the other hand, if a DOL Area Director finds for the alleger and the allegation appears egregious or involves high-level licensee managers, the NRC will determine whether to initiate its own investigation.

In the past, NRC enforcement action was not taken against a licensee until the Secretary of Labor ruled. In March 1992, however, NRC guidance provided that enforcement actions could be initiated based on a DOL Administrative Law Judge's recommended decision for the alleger. This ALJ decision is generally rendered between 6 and 18 months after an appeal of the DOL Area Director's findings. Even though an NRC enforcement action could be proposed following an ALJ recommended decision, the NRC guidance provides that the enforcement action would not become final until the Secretary of Labor ruled.

Justification for this change to the NRC guidance was based on the extensive time required for a Secretary of Labor ruling. An extended period of time often elapses between the time an ALJ recommends a decision and the Secretary rules. As a result, the impact of an NRC enforcement action is diminished by the passage of time between the alleged offense and the ultimate enforcement action. Also, if the 5-year statute of limitations lapses during DOL proceedings, the NRC cannot issue a civil penalty.

For those cases in which an alleger files a complaint only with the NRC, the agency reviews the allegation to determine whether to initiate an investigation. This decision depends on a number of factors, including workload, other higher priority investigations, the availability of investigative resources, and whether the allegation involves egregious circumstances. The NRC has jurisdiction to take enforcement action against a licensee, but no authority to order remedial action for the alleger.

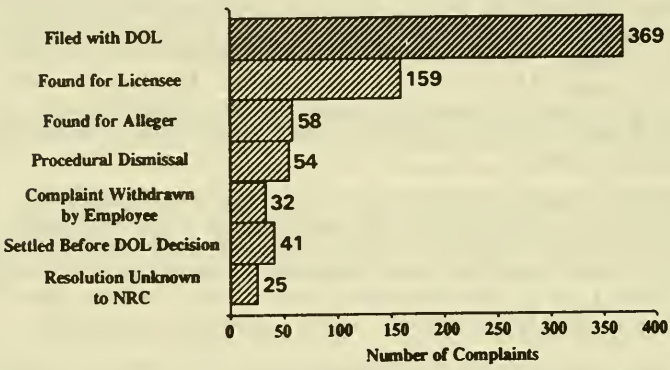
NRC investigations/enforcement actions involving retaliation

The NRC regulates 112 licensed nuclear power reactors with more than 100,000 employees, and more than 8,000 materials licensees and their employees. The OIG

obtained statistical data from the NRC pertaining to complaints of retaliation reported by employees of these NRC licensees.

Between October 1988 and April 1993, the NRC received a total of 609 retaliation complaints. Of this total, 369 complaints were also filed with DOL for investigation. Of the 369 complaints, DOL found for the allegers on 58 occasions, for the licensees on 159 occasions, and 54 complaints were dismissed for procedural reasons. Of the remaining 98 complaints, 32 were withdrawn by the allegers, 41 were settled before any DOL decision was rendered, and the disposition of the remaining 25 is unknown. The following chart displays these data.

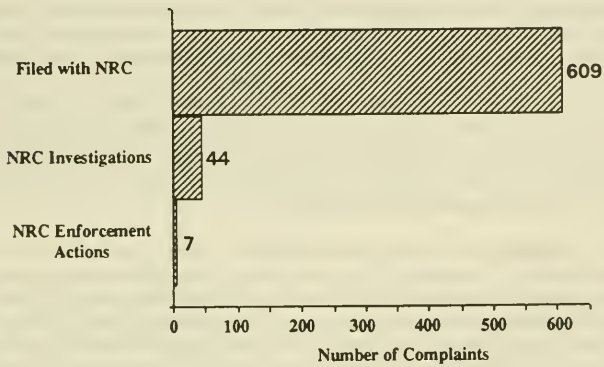
DOL Processing of Complaints
Received from NRC Licensee Employees
October 1988 - April 1993



Of the 609 complaints reported during this period, the NRC Office of Investigations (OI) initiated 44 full-scale investigations. Thirty-one of these 44 investigations have been completed. Eight of these 31 completed investigations were of complaints that were also investigated by DOL. These were among the 369 complaints that were filed with both the NRC and DOL. The remaining 23 completed investigations were conducted in response to the 240 complaints that were filed only with the NRC.

Also during the October 1988 and April 1993 period, the NRC Office of Enforcement took 7 enforcement actions involving 10 of the 609 reported complaints. Three of the actions involved nuclear power reactor licensees. Two of these three enforcement actions resulted in civil penalties being proposed, and the remaining enforcement action resulted in a Notice of Violation without a civil penalty. The proposed penalties were for $25,000 and $130,000, and they are still pending. The following chart displays these data.

Complaints of Retaliation
NRC Investigations and Enforcement Actions
October 1988 - April 1993



ISSUES

This section identifies issues common to complaints received by the OIG from those interviewed. The complaints concerned the NRC's response to reports of retaliation and the impact of this response on whistleblowers. In conducting this inspection, the OIG interviewed 16 whistleblowers who identified issues in the NRC process for responding to retaliation complaints that, in their opinion, contributed significantly to a "chilling effect" for the whistleblowers and their co-workers. The issues mentioned were 1) the lack of a timely NRC response to retaliation complaints, 2) the questionable impact of NRC's "Chilling Effect" letter, and 3) the disclosure of whistleblowers' identities through the NRC inspection process. The OIG also selected anecdotal information from the interviews which were conducted. The anecdotes place in context the effects of the issues identified by the whistleblowers.

Anecdotal experiences of whistleblowers

In 1988, an engineering test technician employed by a nuclear power reactor licensee in the Southwest reported technical concerns to the NRC. The concerns were partially substantiated through the NRC inspection program and reported to the licensee for corrective action. Following the inspection, the alleger was subjected to a number of alleged retaliatory actions by supervisors. These actions involved being moved to a position that required longer work hours, that was more physically demanding, and that increased the employee's level of radiation exposure. The employee filed a Section 210 complaint with DOL. Because a complaint was filed with DOL, the alleger was advised that the NRC would monitor the DOL proceedings.

In 1989, a DOL Administrative Law Judge found for the alleger and ordered the licensee to take remedial action. The licensee sought reversal of the ALJ recommended decision which was sent to the Secretary of Labor for review. Nearly five years after the complaint was originally reported, the Secretary has not rendered a final ruling in this case. During this lengthy process, the NRC did not investigate the licensee's alleged retaliatory actions. The NRC maintained that since the ALJ recommended decision was still being reviewed by the Secretary, the NRC would continue to wait until a final ruling was rendered before considering action.

In October 1992, because of potential statute of limitations problems with this case, and in accordance with the March 1992 revision to the enforcement procedures, the NRC proposed a civil penalty against the licensee based on the 1989 ALJ recommended decision. However, the alleger asserted that the lack of an aggressive response by the NRC following the 1989 ALJ decision contributed to continued acts of retaliation. According to the alleger, the NRC response has also deterred co-workers from reporting concerns and left the alleger "out in the cold."

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In 1989, a mid-level manager employed by a nuclear power reactor licensee located in New England reported serious problems with safety equipment to licensee management and the NRC. This equipment is installed in numerous nuclear power plants throughout the United States. After reporting these problems, the manager reported retaliation by high-level managers to both the NRC and the DOL. The DOL Area Director found for the alleger, and the licensee appealed. Soon thereafter, a settlement was reached between the licensee and the alleger. The alleger continued to be employed by the licensee at that time.

Because of the high-level managers allegedly involved in the retaliation, the NRC initiated an investigation following the DOL Area Director's findings. The investigation was concluded more than 2-1/2 years later, and the NRC proposed an enforcement action approximately seven months after that. From the time the retaliation allegation was reported to the NRC until an enforcement action was proposed, more than 3-1/2 years had elapsed. Throughout the NRC investigation, the alleger complained to the OIG and others about the excessive time taken by the NRC staff to investigate both the technical concerns and the retaliation complaint.

The alleger told OIG that he would not recommend that co-workers follow his example and report safety concerns to the NRC. He based this on his treatment by the licensee for reporting concerns to the NRC and the lack of a timely NRC response to his retaliation complaint. The alleger also told OIG that co-workers expressed serious reservations about dealing with the NRC after learning of the alleger's experience.

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In June 1990, a former executive with a materials licensee filed a complaint with DOL and the NRC alleging retaliation for reporting safety concerns to his management. The DOL Area Director found for the licensee. The alleger did not appeal the decision to DOL but did appeal to a United States Court of Appeals. In communicating with the alleger more than a year later, the NRC announced its intention to close its file on this allegation because there had been no substantive challenge by the alleger of the DOL Area Director's finding. After extensive communications between the alleger and the NRC staff, an investigation of the retaliation complaint was initiated approximately 2-1/2 years after it was first reported to the NRC. On June 14, 1993, the NRC investigative report was issued. Thus, nearly three years elapsed between the time the complaint was filed and the report was issued.

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During this inspection, OIG received letters from two employees of a nuclear power plant in Texas. These employees expressed fear for their jobs based on observing

licensee treatment of co-workers who had cooperated with the NRC and were subsequently terminated.

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In another instance, OIG agreed not to include one alleger's case history in this report because to do so could have revealed the identity of the alleger to licensee managers, which the alleger feared could result in further retaliation.

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An alleger told OIG of having to finance drawn-out legal proceedings without support from the NRC after reporting safety concerns. This alleger expects to file for bankruptcy and lose the family home due to legal expenses and the inability to gain employment. A number of other allegers told OIG that the possibility of financial destitution is a reality they may have to confront after cooperating with the NRC and filing a complaint with DOL.

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The whistleblowers interviewed by OIG described other experiences involving retaliation for having reported safety concerns to their employers or to the NRC. These experiences ranged from physical threats and attacks to psychological intimidation both on and off the job-site. One alleger told OIG of feeling threatened upon learning that a co-worker pointed to a charred mannequin used in fire-fighting exercises and said the alleger could end up in a similar state if the alleger's behavior did not change. This particular incident was investigated by the licensee and OIG, and disciplinary action was taken against the offender. This alleger was ultimately diagnosed to be suffering from "Post Traumatic Stress Disorder" attributed to trauma experienced in the workplace.

Whistleblowers also told OIG of alleged incidents of retaliation that were not verified by the OIG. These incidents included, 1) an alleger's car being forced from the road by unknown assailants while driving home from work, 2) unidentified person(s) shooting at an alleger's residence from a vehicle, 3) poisoning of family pets, and 4) late night harassing phone calls.

Issue 1: Lack of timely NRC response to retaliation

Whistleblowers told OIG that they felt the NRC does little to protect them from retaliation or to investigate their allegations in a timely manner. They described a feeling of abandonment created by the NRC's willingness to "sit on the sidelines" and allow DOL to determine whether the whistleblowers were subjected to retaliation. These whistleblowers believe that the NRC's lack of effort to investigate retaliation complaints results in a "chilling effect" for them and their co-workers.

A number of NRC staff interviewed by OIG concurred that a lack of aggressive and timely NRC response to complaints of retaliation can send a message that retaliation complaints are not a priority matter. This perception can result in a "chilling effect" for whistleblowers.

The Director of the Office of Investigations (OI) stated that a "chilling effect" for allegers is perpetuated by two factors: 1) a lack of effort by the NRC or DOL to quickly develop a remedy for an employee filing a retaliation complaint, and 2) inadequate NRC enforcement action against licensees responsible for retaliation. The OI Director added that allegers' technical concerns are the highest priority for the NRC engineering staff to address. He opined, however, that the NRC staff are largely comprised of engineers and other technical personnel who are not normally comfortable responding to personnel problems. For this reason, the NRC often fails to consider that an alleger's welfare is the second-most important aspect of a safety concern. The OI Director maintained that this attitude contributes to the "chilling effect" nuclear industry employees must endure.

The Director of the Office of Enforcement (OE) stated that it is difficult to determine whether a chilling effect exists for industry employees. He said he was opposed to NRC inspection teams personally conducting interviews and surveys on-site and rendering a decision about a "chilling effect." The OE Director noted that employees who are, in fact, "chilled" would likely be unwilling to express their true feelings to NRC inspectors.

Issue 2: Questionable impact of NRC's "Chilling Effect" letter

When a DOL Area Director finds that an alleger was retaliated against, the NRC sends the licensee a "Chilling Effect" letter. The purpose of the letter is to obtain an explanation of what the licensee has done and plans to do to ensure that the retaliatory act does not have a "chilling effect" on other employees. In responding to this letter, the licensee routinely describes an operational program for informing employees of their responsibility to report safety concerns, and to do so without fear of reprisals.

In one case, the licensee responded to the "Chilling Effect" letter, in part, by stating that employees are briefed on a statement of standards and expectations for guiding employee actions. These standards included an explanation of employee rights to report safety concerns to management or to the NRC without fear of reprisal. Had the NRC verified this response, they could have found evidence that a large number of employees had not been briefed on this statement. In fact, a licensee internal audit determined that more than 50 percent of the employees surveyed had not been briefed.

The NRC staff had varying opinions about the usefulness of the "Chilling Effect" letter. However, several felt it was ineffective and had no deterrent effect for licensees. Comments were made that responding to the letter was a formality to which licensees

had become proficient. The staff told OIG that the NRC did not routinely verify representations in licensees' responses to "Chilling Effect" letters.

The OE Director stated that he was responsible for developing the "Chilling Effect" letter issued to licensees suspected of retaliation. While the letter may have been useful to the NRC when it was first used in 1988, he felt that it may no longer be effective if licensees are providing the same responses to the letter. The OE Director said he felt that certain licensees took the letter seriously. The Director concurred that an alternative to using a "Chilling Effect" letter would be for the NRC to conduct personal interviews of "problem licensees." However, the OE Director said he did not think this alternative should entirely replace the NRC's use of the letter.

The OI Director stated that a "Chilling Effect" letter is "a piece of paper that means little or nothing." He explained that the letter has little deterrence value for licensees who would retaliate against employees. The OI Director stated that the NRC is too willing to accept licensees' responses to these letters without question.

Issue 3: Disclosure of whistleblowers' identities

Numerous allegers informed OIG that they believed the NRC compromised their identities to their employers. According to these allegers, once it became known they had reported safety concerns to the NRC, acts of retaliation occurred.

The NRC has procedures in place to protect the identities of allegers who report safety concerns. Specifically, NRC Management Directive 8.8, Management of Allegations, notes the importance of protecting an alleger's identity, and in all instances the identity should not be revealed without the alleger's consent. This directive extends to protecting reports and documents that could, by their content, identify an alleger.

Despite NRC attempts to protect the identities of allegers, their identities can become known through the NRC's recommended course of action. NRC procedures encourage licensee employees to first attempt to resolve their concerns with licensee management. If this attempt is unsuccessful, the employee then should report the concerns to the NRC. If employees follow this path, they have identified themselves to their management as being concerned about a particular safety issue. If the employees then take their technical concerns to the NRC and the NRC conducts an inspection of the same safety issue, the allegers could be easily identified. Disclosure of an alleger's identity through this process is known as "fingerprinting."

SUGGESTIONS FOR CHANGE

Many of the NRC staff and the allegers interviewed by OIG believe that the current NRC policy for responding to retaliation complaints contributes to a "chilling effect" for many employees in the nuclear industry. During this inspection, OIG received numerous suggestions for changing the agency's policy for responding to whistleblower complaints from several sources including the NRC staff. These NRC staff believed that most of the suggestions could be achieved by adjusting NRC policy, while others would require legislation.

The NRC staff interviewed by OIG emphasized that before any of these suggestions are adopted, one very important factor had to be considered. That factor is that the acceptance of additional investigative responsibilities will require either a shifting of work priorities, or the NRC will need to request additional investigative and enforcement resources. The following suggestions were offered as possible improvements to those NRC policies dealing with retaliation complaints. These suggestions and comments were provided by allegers, NRC staff, and attorneys representing both the allegers and the nuclear industry.

Use of the "Wrongdoer Rule"

Substantial criticism was directed at the NRC practice of penalizing only licensees for retaliation. Allegers maintained that individual managers responsible for willful acts of retaliation were not penalized and often continued working in the nuclear industry. Attorneys representing both allegers and industry licensees concurred that use of the "Wrongdoer Rule" is a potentially effective means of assigning responsibility to individuals found guilty of willful misconduct. This rule allows the NRC to order an employee to be removed from licensed activities.

NRC investigative interviews versus "Chilling Effect" letter

Allegers and several of the NRC staff OIG interviewed agreed that the NRC places too much reliance on unverified licensee responses to the "Chilling Effect" letter. They maintained that a preliminary inquiry by NRC investigators would be more effective in determining whether a potential "chilling effect" exists. Specifically, the investigators could obtain first-hand explanations about alleged retaliation, review pertinent documentation and conduct interviews of licensee managers.

Protection for actively-employed allegers during NRC investigation

The allegers and a number of NRC staff suggested that the NRC could order licensees to temporarily protect an alleger's employment status. This protection would continue at least until the NRC had completed its own investigation of the alleged retaliation. Other NRC staff expressed concern that this practice could be easily abused by an employee

with a frivolous complaint to avoid an adverse personnel action or a scheduled layoff. However, this option could be considered when these improper motives can be ruled out.

Increased civil penalties and other enforcement actions

The allegers and numerous NRC staff interviewed by the OIG, and certain attorneys representing allegers stated that the current monetary level of civil penalties has little deterrence for licensees. Substantially larger monetary fines are an alternative, but many of those interviewed questioned the impact of a larger civil penalty. There were also mixed opinions about the impact of negative publicity associated with an NRC civil penalty. However, nearly all interviewees agreed that NRC ordering the shutdown of a nuclear power plant or revoking a license would be the most significant penalty to impose on licensees. These are the most severe penalties available to the NRC, yet many of the interviewees maintained that these were the only penalties which would cause licensees to consider retaliation to be a serious violation.

The OI Director stated that current civil penalties are insufficient for nuclear reactor licensees found guilty of retaliation. He recommended a minimum penalty of $500,000 for those licensees responsible for retaliation, with a portion of the penalty awarded to the alleger. The OI Director noted that a recent civil penalty of $100,000 levied against a nuclear power plant for retaliation failed to even cover the cost of his office's investigation.

The OE Director said a $240,000 penalty imposed against TVA represents the largest NRC civil penalty for retaliation. He maintained, however, that the size of a civil penalty may be irrelevant to deterring retaliation. One expectation from significantly increasing the size of civil penalties is a rise in the amount of litigation the NRC would face, according to the Director. While the NRC has the capability of revoking a license for retaliation, the OE Director said the most realistic and effective way of "getting a licensee's attention" is through negative publicity involving an enforcement action.

Full NRC investigative responsibility for retaliation

If the NRC assumed total responsibility for investigating and adjudicating retaliatory complaints reported by licensee employees, there would be a positive impact in reducing the "chilling effect," according to allegers, certain NRC staff, and attorneys representing allegers. These individuals believe that a positive impact would result from a visible NRC investigative presence. The interviewees said that timely investigations and enforcement actions by the NRC will provide licensees with a strong message that retaliation will not be tolerated. Also, licensee employees will know that the NRC can provide protection to those employees who cooperate with the NRC. The interviewees recognized that this option would likely require additional NRC investigative resources or a reassessment of the system for determining investigative priorities. Further, the

NRC would have to assess the resource impact that the assumption of the DOL adjudicating process would have on the agency.

The OI Director recommended that the NRC assume full jurisdiction for the investigation and adjudication of retaliation cases. He maintained that more industry employees would be encouraged to report safety concerns if they knew the NRC would protect them from unwarranted retaliation. The OI Director said the only way the NRC can deter retaliation is for the NRC to become involved in retaliation cases earlier.

The Director of OE concurred that the most effective way of reducing a potential "chilling effect" is early investigation by the NRC. However, he cautioned against potential conflicts arising from differing agency rulings between DOL and the NRC.

Investigative resources for retaliation cases

Allegers complained that the time required for their cases to complete a review by DOL was unacceptable. They further criticized the NRC for contributing to a "chilling effect" by waiting for a DOL finding before initiating an investigation or enforcement action. The staff generally concluded that the NRC is unable to initiate earlier investigations of retaliation cases without an effective increase in the investigative staff or an adjustment to the priorities assigned to investigative cases.

Of interest to this topic is a recent investigative initiative by the Tennessee Valley Authority, Office of the Inspector General (TVA-OIG). That initiative was begun with the encouragement of the NRC. In 1990, TVA-OIG changed a policy that significantly enhanced the scope of their investigative program. Based on the policy change, TVA-OIG started conducting investigations that are parallel with the DOL's investigations of retaliation.

During the three years the TVA-OIG program has been underway, the program manager said his investigators completed the majority of their investigations before DOL completed its cases. This achievement was attributed to the fact that 1) all TVA investigations are geographically centralized, 2) only experienced investigators are assigned to these cases, 3) the investigations receive the highest priority, and 4) additional resources are available when necessary from other TVA-OIG investigative components. This three-year-old unit is comprised of 8 investigators.

Comments from private attorneys

The OIG received a letter from a senior partner of a Washington, D.C. law firm representing a large number of utility licensees. The following were among the views expressed in the attorney's letter:

-- Endorsement of the NRC's policy of allowing the DOL process to conclude before responding to any alleged retaliation. The attorney expressed a desire that the NRC "stay its hand" rather than change any existing policies of this nature. It was noted that the NRC investigative process does not include a mediation role, and parallel NRC/DOL investigative efforts could "polarize" employment relationships and interfere with the DOL mediation and conciliation effort.

-- Early intervention by the NRC could distort priorities and divert licensee management resources away from more significant safety issues.

-- The DOL process is both effective and expeditious, although it is criticized by a relatively small number of complainants and the attorneys who specialize in representing these complainants. Through this process, a wrongfully terminated employee can expect to obtain relief far more quickly from DOL than in a state court or other legal forum.

One attorney representing whistleblowers commented that:

-- NRC civil penalties levied against reactor licensees are no deterrent because the amounts are so small.

-- Any duplication of effort between DOL and the NRC could be eliminated if the NRC would be responsible for conducting the entire investigation from the outset.

Another attorney representing whistleblowers stated that:

-- Whistleblower clients are advised to file suits in state or local courts rather than seek remedies through the NRC or DOL. This advice was based on the attorney's belief that the NRC's performance in investigating whistleblower complaints was "terrible," and DOL performance was "only slightly better." The attorney attributed the NRC's poor performance partially to inadequate investigative resources.

-- NRC licensees are not concerned about adverse publicity stemming from a retaliation case. It was explained that until the Congress and the NRC are willing to take appropriately vigorous action against offending licensees, negative newsclippings are meaningless to licensees.

-- As a condition of licensing, the NRC should require a licensee not to condone retaliation of employees reporting safety concerns.

FINDINGS

Based on the information developed during this inspection, we found that the NRC process for handling allegations of retaliation does not provide an adequate level of protection for whistleblowers. Our inspection disclosed substantial dissatisfaction with the process among the allegers and numerous NRC staff we interviewed. The NRC staff acknowledged that the current NRC practice of awaiting DOL decisions does not provide for timely resolution of allegations. Such a delay can send a message that retaliation complaints are not a priority concern. This perception can result in a "chilling effect" for whistleblowers and their co-workers who may have additional safety concerns to report to licensee management or to the NRC.

Allegers and certain NRC staff told us this "chilling effect" would be diminished if a number of policy changes were initiated. These suggested changes include 1) earlier NRC investigations of retaliation complaints, 2) increased civil penalties for retaliation, and 3) more vigorous use of the Wrongdoer Rule to hold individuals responsible for retaliation.

The NRC staff had varying opinions about the usefulness of the NRC's "Chilling Effect" letter. However, several believed it was ineffective and had no deterrent effect for licensees. Further, the staff told OIG that the NRC did not routinely verify licensees' responses to "Chilling Effect" letters.

NRC practice has been to take an enforcement action against an offending licensee and issue a Notice of Violation or a civil penalty, when appropriate. However, several of the NRC staff and others interviewed by the OIG felt the NRC should take legal actions against individuals responsible for retaliation. In this regard, two options available to the NRC are the Wrongdoer Rule and the potential criminal penalties of 42 USC 2273.

STATEMENT SUBMITTED BY

UNITED STATES NUCLEAR REGULATORY COMMISSION

TO THE

SUBCOMMITTEE ON CLEAN AIR AND NUCLEAR REGULATION
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

CONCERNING

NRC'S HANDLING OF HARASSMENT AND
INTIMIDATION ALLEGATIONS

PRESENTED BY
IVAN SELIN
CHAIRMAN

SUBMITTED: JULY 15, 1993

Mr. Chairman and members of the Subcommittee, we are pleased to appear before you to discuss the Commission's activities in addressing concerns raised by whistleblowers and the recent Inspection Report of the NRC's Inspector General.

While this hearing is about whistleblowers, we believe the vast majority of employees don't want the publicity of being a whistleblower. They just want their safety concerns addressed. Therefore, in our testimony today, we have used the term "allegers," rather then "whistleblowers", because the NRC considers safety allegations submitted by individuals engaged in regulated activities to be very important to our regulatory system whether the individual goes public or seeks confidentiality.

From a practical point of view the NRC, even with its many inspectors, can only review a fraction of licensed activities. Although the NRC's program for ensuring adequate protection is not structured to be dependent upon allegations of safety deficiencies, we will never have the knowledge possessed by the thousands of employees in the nuclear industry. The NRC therefore has placed a high value on employees in the nuclear industry being free to raise potential safety issues to their management. Over the years the NRC, the regulated industry, and the public have benefitted from the issues raised by employees of licensees and their contractors. While the NRC encourages employees to raise safety issues first to their employers, employees must also feel free to raise safety concerns at any time directly to the NRC.

Employee Concerns Have Made A Difference

The NRC receives more than 800 allegations a year, many of which raise valid issues of which the NRC would otherwise not be aware. Although it is true that concerns are also raised where NRC was already pursuing the matter, where the licensee was pursuing the matter, or, albeit in good faith, the alleger was technically wrong, it is, nevertheless, important that employees, regardless of the merits of their concerns, feel free to raise their safety concerns.

Let me just describe a few of the cases where concerns of employees have made a difference. Contractor employees raised questions concerning the attentiveness of operators at the Peach Bottom Atomic Power Station in Pennsylvania, resulting in the NRC's ordering the shutdown of that facility. At the Palo Verde Nuclear Generating Station in Arizona an employee identified to the NRC significant failures to assure adequate emergency

lighting, an action that resulted in civil penalties and corrective action. An employee at Radiation Technology Inc. in New Jersey informed NRC of the bypassing of safety interlocks at a large irradiator facility, which resulted in the NRC's requiring the shutdown of operations. Finlay Testing Laboratory's radiography operation in Hawaii was suspended by the NRC following allegations of transportation violations. Generic safety issues such as the Thermo-Lag fire barriers, Rosemount transmitters, and water-level instrumentation at boiling water reactors are being addressed as a result of employees' providing information to the NRC. Employee concerns were also instrumental in causing a review of the quality of construction at the Watts Bar Nuclear Station -- a plant in Tennessee where corrective actions for these concerns are still underway -- and, in the past, at other reactor facilities such as Comanche Peak in Texas.

It is clearly in the public interest for employees to raise safety issues. We think it is also in the licensees' interest that such concerns be identified and addressed promptly before they result in an accident. To preserve this necessary flow of information, licensees should establish working environments in which employees have questioning attitudes and feel free to raise issues without fear of harassment and intimidation. In fact, most reactor licensees have supplemented their required quality assurance programs with programs which encourage employees to come forward with safety concerns. It is our belief that the majority of safety concerns raised within the licensees' organizations are resolved satisfactorily within the normal course of licensees' activities.

I want to emphasize that the vast majority of the employees who submit allegations to the NRC or raise issues to licensees do so without retaliation. As you know, however, there are cases where retaliation has occurred. Discriminatory actions taken against licensee and contractor employees for raising safety issues either to their management or to the NRC, are simply not acceptable. The NRC's focus has been on preventing discrimination from occurring and, where it does occur, on taking action to remove any related potential chilling effect. In other words, we are not satisfied unless the potential allegers themselves can reasonably believe that they will be free of intimidation and harassment so that they will not be deterred from coming forward with their safety concerns.

Regulatory Framework

Before discussing our regulatory program and actions we take to address discrimination, it may be helpful to discuss briefly the regulatory framework for the protection of allegers.

Prior to the enactment of section 210 (now 211) of the Energy Reorganization Act, the Atomic Energy Act provided the Commission with authority to investigate cases of potential discrimination for raising safety issues and to take appropriate enforcement action against licensees. However, the NRC staff took the view that the Atomic Energy Act did not provide the Commission with authority to provide an individual remedy, such as reinstatement or back pay for an employee who has been subjected to discrimination. With the enactment of section 210 in 1978, a process was established to provide such a remedy through the Department of Labor.

Section 210 prohibited employers from discriminating against employees who raise safety issues to the NRC or its licensees. This legislation gave the DOL new responsibilities for employee discrimination, which complemented the NRC's jurisdiction over such matters. Employees seeking a personal remedy for discrimination were originally required to file a complaint with the DOL within 30 days of the discrimination. Section 210 also provided that the Secretary of Labor, after an opportunity for a hearing, was to order a violator to take action to abate the violation, including reinstatement of the complainant to his or her former position with back pay, if warranted, and with compensatory damages and attorney fees.

Passage of section 210 did not preclude the NRC from taking appropriate action against licensees where employees suffered retaliation for raising safety issues. The NRC recognized, however, that in view of DOL's complementary responsibilities, coordination was warranted. Consequently, the DOL and the NRC entered into a Memorandum of Understanding in 1982. Under the MOU it was agreed that administrative efficiency and sound enforcement policies would be maximized by cooperation and the timely exchange of information. Working arrangements between the NRC and DOL were agreed to in 1983. These arrangements provided that the NRC would not normally initiate an investigation of a complaint if DOL was conducting an investigation or had completed an investigation and found no violations. These arrangements further provided that if DOL found no violations, the NRC would not normally initiate enforcement action. If, however, DOL finds that a violation occurred, the NRC may take enforcement action, but will normally consider the effect of the action taken by DOL.

Following enactment of section 210, the Commission in 1982 issued regulations to prohibit discrimination against employees for raising any safety concerns. These regulations, such as 10 CFR 50.7, provide notice that discrimination is prohibited, that civil penalties and other enforcement action may be taken against licensees for their violations and for violations caused by their contractors and subcontractors, and that NRC Form 3 describing the rights of employees must be posted.

Apparently, of the agencies whose statutes provide for the DOL to provide remedies for individuals who have been subjected to discrimination, the NRC is the only agency that has negotiated an MOU with the DOL. Unlike the NRC, most of the other agencies we have contacted do not take enforcement action against their regulated entities for discrimination; they are generally satisfied with a remedy to the individual.

More recently, as part of the Energy Policy Act of 1992, section 210 was amended (and renumbered section 211) to provide, among other things, that employees would have 180 days after the alleged discrimination occurred, rather than the 30 days previously allowed, in which to file complaints with the DOL. This change was supported by the Commission because in the past the DOL frequently did not act on employees' claims because they were filed after the 30 day deadline.

Section 211 was also amended to modify the burden of proof which had been followed by the DOL in administrative hearings on section 210 cases. Employees must first demonstrate that the protected activity was a contributing factor in the unfavorable personnel action. The employer, however, must then demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. This change should facilitate relief for employees who have been retaliated against for engaging in protected activities.

Section 211 now specifically provides protection for employees who raise safety issues to their employers. While the NRC and the DOL have long held the view that such employees were protected, the Fifth Circuit Court of Appeals, alone among the circuit courts, had taken the view that only employees who provide information directly to the NRC are protected. Prior to the enactment of the 1992 amendments, we had actively encouraged both the DOL and Department of Justice to support the position that employees bringing safety concerns to their employers must also be protected. NRC continues to support that view in current pending cases that arose prior to the 1992 amended legislation.

In addition, section 211 now provides that the Secretary of Labor is to order immediate relief on the basis of the recommended decisions of Administrative Law Judges before undertaking a review of the record. This change is particularly important because employees found by DOL to have been discriminated against have often had to wait several years for the Secretary to complete a review of the record before the remedy was ordered.

These changes to 211 should assist allegers in getting remedies for damages caused by discrimination.

The NRC has proposed regulations to reflect the changes to section 211. In addition, the NRC is reissuing Form 3 to provide notice to licensee employees of the changes to section 211.

Current Regulatory Process

With that background, let us now discuss how the NRC actions in the area of allegers have evolved over time. We have changed our regulatory framework to focus more sharply on this issue.

Allegations have always been a concern to the NRC. Employees may contact NRC inspectors directly or may call NRC collect. Initially, allegations were handled informally within the staff. Following a number of significant licensing proceedings in the early 1980's, a more formal system was developed and adopted in 1987 as an agency-wide allegation management system. An NRC Manual Chapter codified a number of policies including confidentiality, procedures for allegation review, and scheduling and setting priorities of investigations.

In April 1992 the NRC's Inspector General reviewed the adequacy of NRC's process for managing allegations. In his audit report the Inspector General concluded that the allegation management system "was working satisfactorily" and that it provided "...a reasonable level of assurance to the Commission that allegations received are being addressed in a timely and effective manner..."

Under these procedures the NRC staff reviews each allegation for technical safety significance, making determinations as to the appropriate method to resolve the safety issue. Allegations are often referred to licensees for resolution because the licensees have the primary responsibility for the safe operation of their facilities. In making referrals to licensees precautions are taken so that the alleger is not identified. Referrals are decided via a case-by-case determination that includes consideration of 1) whether the alleger has voiced concerns over the release of the allegation to the licensee, 2) the possibility of harm to the alleger if the allegation was referred to the licensee, 3) whether the allegation is made against the licensee's management who would receive and address the allegation, and 4) whether the alleger has already raised the issue to the licensee with unsatisfactory results. The April 1992 Inspector General report also concluded that referrals to licensees properly took these considerations into account.

Where allegers suggest that discrimination may have already occurred, we emphasize to the individuals that they must contact the DOL promptly, because of the statutory deadlines, if they seek a personal remedy for the discrimination. The NRC, independently of the DOL process, will evaluate the technical

safety issue, taking immediate action if the public health and safety so requires.

The Commission's Statement of Policy on Confidentiality recognizes that individuals coming forward voluntarily to the NRC contribute to our inspections and investigations. We recognize that many individuals raising concerns have no desire for publicity and that some individuals will come forward only if they believe their identity will be protected from public disclosure. The NRC therefore does not normally disclose the identity of allegers and, in the interest of getting safety information, the NRC will make its best efforts consistent with the law to protect the identity of confidential sources. In recent years we have improved our performance in protecting confidentiality and the identity of allegers.

If there appears to be an issue of discrimination and the individual has not filed a complaint with the DOL, the matter is discussed with our Office of Investigations (OI) in an internal, formal allegation panel; OI then determines whether an investigation is warranted. If the individual has filed a complaint, NRC monitors the DOL process. If the DOL process ends without a decision on the merits, such as a settlement, withdrawal, or a dismissal based on a procedural or jurisdictional issue, an allegation panel again is held to consider the need for an investigation. As part of that review the staff considers the results of the DOL investigation. While the NRC investigations of allegations of discrimination are normally held in abeyance pending the DOL process, there are times, because of the significance of the issues to public health and safety, that investigations are conducted notwithstanding the ongoing DOL process.[1] We are considering using this simultaneous approach more frequently because of the time it takes for the DOL process as well as the possibility that the DOL process may, after a wait of several years, end without a decision on the merits.

Prior to 1988 we generally took no action pending a decision by the Secretary of Labor. Subsequently the staff, on its own initiative, established the practice in which, for each case where the DOL initial investigation finds discrimination, a letter is issued to request from the licensee (1) its basis for the employment action against the individual and (2) the actions taken or planned to ensure that the alleged discriminatory actions, whether actual or perceived, do not have a chilling effect on other employees who could raise safety concerns. These letters, known as "chilling effect letters," are not substitutes for enforcement action; they are issued to make NRC's interest known to the licensee, to encourage the licensee to initiate

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[1] Charts 1 and 2 depict these processes graphically.

corrective action in advance of a finding by the Secretary of Labor of a violation, and to assure that the licensee knows of the DOL complaint. This latter point is important because many times it is a contractor, not the licensee itself, who is the focus of the DOL action; in such cases DOL does not communicate with the licensee.

If the Secretary of Labor finds discrimination, the NRC considers initiating escalated enforcement action. Under the Commission's enforcement policy a violation involving discrimination is considered of significant regulatory concern and civil penalties are considered. Since October 1988, 20 enforcement actions involving discrimination have been issued. Of these, seven actions have been issued on the basis of concerns raised since October 1988. Four civil penalties have been issued with penalties up to $100,000 per violation, the statutory maximum penalty for a violation. One order was issued regarding employment of a person who had engaged in discriminatory activities. Two Notices of Violation without civil penalties have also been issued. In addition to the financial impact of the enforcement actions, the adverse publicity associated with the civil penalties may also have beneficial effect in gaining lasting corrective action.

In several significant cases we lost the opportunity to take civil penalty actions because the discrimination occurred more than five years before the DOL process closed and thus action was barred by the statute of limitations. As a result, the staff in 1992 began initiating enforcement action following findings of discrimination by DOL's Administrative Law Judges rather than awaiting the final action of the Secretary of Labor. This should significantly improve the timeliness and effectiveness of NRC enforcement actions since the Secretary's decisions on average are issued about 15 months after the Administrative Law Judges' decisions.

It should also be recognized that many of the DOL cases are settled before a DOL decision has been made. Settlements may be beneficial to the extent that they provide remedies without the cost and uncertainty of litigation. There was concern, however, that some of these settlement agreements might have in themselves restricted employees from providing information to the NRC. Therefore, the NRC communicated this concern to the Secretary of Labor and amended our regulations in 1990 to prohibit agreements or unilateral employer actions affecting the compensation, terms, conditions, or privileges of employment from restricting or discouraging employees from raising safety concerns. The change also prohibits employers from threatening employees if they raise safety issues.

Another important change to the regulatory process was a recent rulemaking which clarified that willful violations of the NRC

employee protection regulations are subject to criminal sanctions. This should further serve to discourage licensees from engaging in discrimination -- not only will they face the potential for damages from DOL and civil penalties from NRC for discriminatory conduct, but prosecution by DOJ and criminal sanctions as well.

In 1991 the Commission enacted a series of regulations entitled "Deliberate Misconduct" (e.g. 10 CFR 50.5), providing for action directly against licensee's employees who engage in deliberate misconduct, including discrimination. This should provide yet additional deterrence as supervisors and managers now risk losing the ability to be employed in the nuclear industry for causing discrimination.

It needs to be noted that it is not NRC, the regulator, but the licensee who has the first responsibility for safety. Thus, in our view, it is not enough for employees to feel free to come directly to NRC; employees must feel free to go directly to their employers.

In that regard the NRC encourages employees to report violations immediately to their supervisors so that the licensee can investigate and resolve the issues. It is our expectation that in the normal course of business, licensees, through their own organizations and managements, will not only put in place a process to elicit safety concerns from their employees but also create an environment in which all of their employees feel free to raise safety concerns directly with their management without the need for NRC involvement. As we said earlier, we believe that the majority of safety concerns are raised in and satisfactorily resolved by the licensees' own organization.

In addition, reactor licensees are required to have quality assurance programs for identifying and correcting safety deficiencies. Reporting concerns to management is in essence just another way to make quality assurance more effective. Reactor licensees have various reporting systems for employees to report deficiencies and safety issues. It is not unusual to have several hundred reports filed by employees each year on matters such as procedural, design, and equipment deficiencies.

Approximately 50 of the 71 reactor licensees also supplement their required quality assurance programs with various employee concerns programs to encourage employees to come forward with safety concerns. These programs provide for employees to raise concerns outside their supervisory chain; they frequently provide for confidentiality or anonymity to encourage employees to raise issues without fear of retaliation. There are also good-performing licensees who don't have formal employee concern programs but where employees routinely raise safety issues to their employers. Thus, the real question is not whether there is

a structured program, but rather whether the licensee has established a safety culture throughout its organization whereby management in fact encourages employees to raise safety concerns and the employees know that management expects and appreciates issues being raised.

The Commission in several cases has looked beyond the treatment of individual cases of discrimination and looked more broadly at licensees to provide assurance that employees feel free to raise safety issues both to their management and the NRC. These examinations have included reviews at Turkey Point, Comanche Peak, Nine Mile Point, and TVA. Most recently survey inspections were conducted at Millstone, South Texas, and Palo Verde after the NRC became concerned whether employees felt free to raise issues to their licensees. Because of the number of issues at Millstone, the staff established a special review panel for that case. The staff recently issued a significant civil penalty action against Northeast Utilities, which included a Demand for Information concerning the performance of their senior executives. This is considered an important action because we want to make it clear to licensees that we are holding their executives responsible for assuring that they establish work environments that seek out and reward the raising of safety concerns, rather than tolerating an environment that is hostile to employees raising safety concerns. In the Commission's view, it is clear that the better performing licensees are those who seek to encourage their employees to raise safety issues and have a questioning attitude.

In summary, we have done quite a bit over the years to establish avenues whereby allegers can come forward with confidence. Our regulatory program, unlike that of most Federal agencies, has authority which allows us to take enforcement action against licensees directly. But just having regulatory requirements and an avenue for remedial action may not be enough. The question remains, should we do more?

Areas to Review

While the existing programs have evolved over time to further the public health and safety, the recent inspection report of the Inspector General found dissatisfaction with the current NRC and DOL regulatory processes for protecting allegers among the 16 allegers and 26 NRC staffers whom the Inspector General interviewed. There are clearly issues, some of which are highlighted by the Inspector General Inspection Report, which we need to consider in order to assure ourselves that we have established a regime where the great majority of employees perceive a fair system to raise issues.

The report listed five suggestions for changes made by persons interviewed by the IG. Three of those suggestions addressed changes to the investigation process and two of the changes addressed enforcement issues.

The Commission has already taken steps to establish a senior staff panel to review this report, the April 1992 Inspector General report on allegation management, and other issues associated with allegers to determine if changes to regulations, policies, or practices are warranted. This review will consider:

1) whether we have taken sufficient action through issuance of regulations, policy statements, and inspections to assure that our licensees encourage their employees and contractors to raise safety concerns without fear of reprisal,

2) whether the current NRC process for handling allegations is appropriate from the perspective of allegers feeling free to bring safety concerns to the NRC, and

3) where discrimination may have occurred,

a) whether there are NRC actions that can assist in a speedier resolution of issues within the DOL process,

b) whether NRC should be more proactive in conducting investigations during the pendency of DOL proceedings,

c) whether the NRC takes sufficient follow up action to determine if the licensee has taken action to remove the potential chilling effect arising from the discrimination,

d) whether the NRC can and should use civil penalties and orders more vigorously to emphasize the need for licensees actively to encourage employees to raise safety concerns without fear of discrimination, and

e) whether the NRC can and should use orders and demands for information more vigorously, where individuals are found to have caused discrimination.

We also need to consider whether the NRC is sufficiently proactive in cases where employees raise concerns with the NRC and express fear that they may become subject to retaliation for raising safety concerns. While this review will focus primarily on the existing statutory system since section 211 was so recently amended, there may be recommendations for additional statutory changes. We also recognize that some changes may have

significant resource implications. We will, of course, consult with the DOL and DOJ as part of this review and report the results back to the Congress. A report is due to the Commission early this fall.

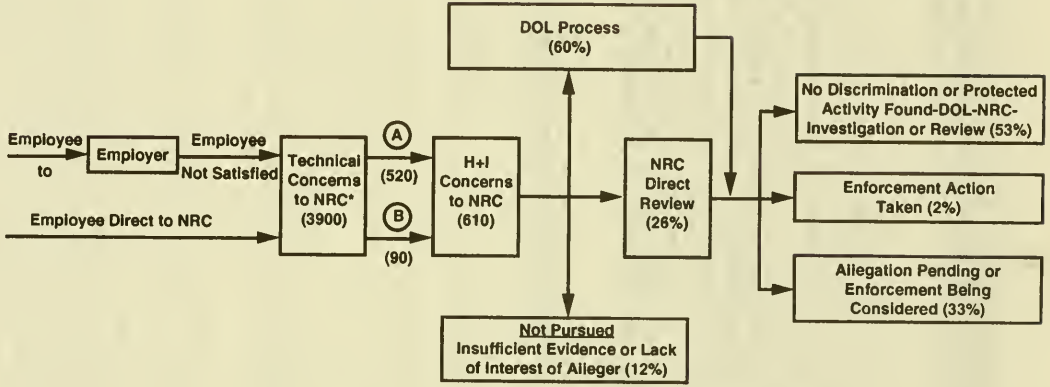
Conclusion

In conclusion, I would like to reiterate that the NRC values the contribution employees in the nuclear industry have made by coming forward with their concerns. The NRC needs to assure that its actions will cause licensees to foster an atmosphere where such individuals will be encouraged to come forward with information. Much of this is happening already, but there may be more that we can and should do in order to further encourage allegers to come forward. We intend to review the findings of the Inspector General's Inspection Report fully and to make full use of these findings in the interest of furthering the safety mission of the Commission.

Mr. Chairman, this completes our prepared statement. We will be pleased to answer any questions that you and the Subcommittee may have.

NRC Resolution of H+I Concerns

(Concerns Raised Between October 1988 and April 1993)

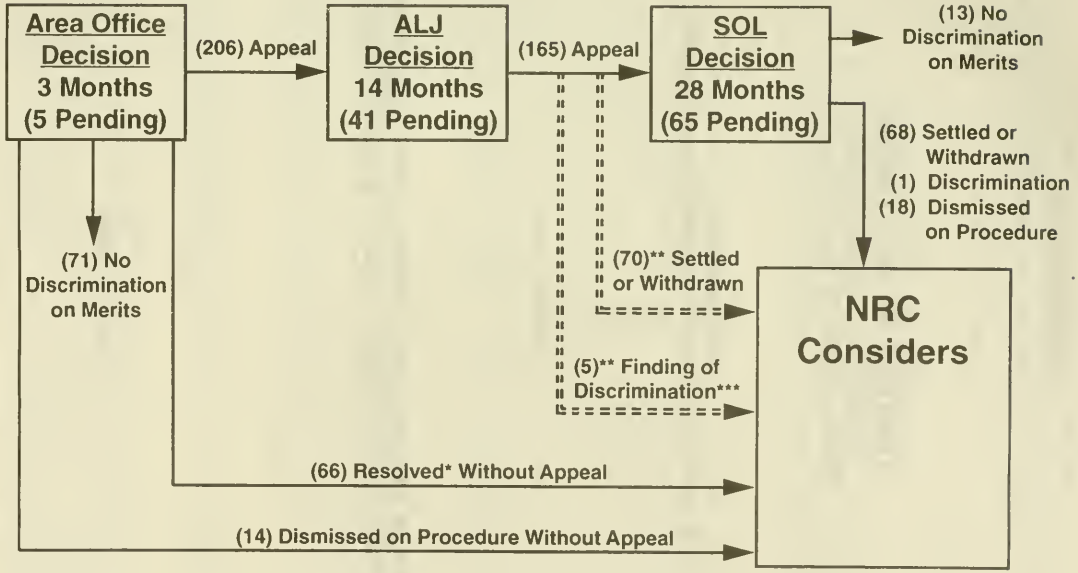


Ⓐ Number of H+I Concerns Because of Issue Raised With Employer/Licensee
Ⓑ Number of H+I Concerns Because of Issue Raised at NRC Where the Issue Was Not Raised With Employer/Licensee
* NRC Considers Each Safety Concern
( ) Numbers Approximate

Chart 1

DOL PROCESS

(Concerns Raised Between October 1988 and April 1993)



* Resolved = Finding of Discrimination or Settlement (Including Withdrawn Cases)
** NRC Considers in Parallel During Review by SOL
*** After April 20, 1992
( ) Number of Cases Based on NRC Data

Chart 2

TESTIMONY OF

JEROME H. GOLDBERG
President, Nuclear Division
Florida Power & Light Company

on behalf of
THE AMERICAN NUCLEAR ENERGY COUNCIL

Before the

CLEAN AIR AND NUCLEAR REGULATION SUBCOMMITTEE
OF THE SENATE ENVIRONMENT AND PUBLIC WORKS COMMITTEE

July 15, 1993

TESTIMONY OF JEROME H. GOLDBERG

SUBCOMMITTEE ON CLEAN AIR AND NUCLEAR REGULATION

JULY 15, 1993

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

MY NAME IS JERRY GOLDBERG. I AM PRESIDENT OF THE NUCLEAR DIVISION OF FLORIDA POWER & LIGHT COMPANY (FPL). FPL OWNS AND OPERATES FOUR NUCLEAR GENERATING UNITS, TWO AT ITS TURKEY POINT SITE NEAR HOMESTEAD, FLORIDA AND TWO AT ITS ST. LUCIE SITE NEAR FT. PIERCE, FLORIDA.

I AM NOT HERE TODAY AS A REPRESENTATIVE OF FPL OR ANY OTHER INDIVIDUAL COMPANY ENGAGED IN THE NUCLEAR INDUSTRY, ALTHOUGH MY REMARKS OBVIOUSLY REFLECT MY PERSONAL EXPERIENCE IN THE INDUSTRY OVER THE PAST THIRTY YEARS. I AM HERE ON BEHALF OF THE AMERICAN NUCLEAR ENERGY COUNCIL (ANEC) TO PRESENT INDUSTRY'S VIEWS ON THE OPERATION OF THE EMPLOYEE PROTECTION PROVISIONS OF THE ENERGY REORGANIZATION ACT AND THEIR IMPLEMENTATION BY THE NUCLEAR REGULATORY COMMISSION (NRC) AND THE U.S. DEPARTMENT OF LABOR (DOL). ANEC REPRESENTS OVER 100 COMPANIES WITH AN INTEREST IN NUCLEAR ENERGY, INCLUDING INVESTOR, PUBLIC, AND COOPERATIVELY-OWNED NUCLEAR UTILITIES, MANUFACTURERS, ARCHITECT-ENGINEERS, NUCLEAR WASTE MANAGEMENT, AND OTHER FIRMS ENGAGED IN THE NUCLEAR FUEL CYCLE.

AS A PRELIMINARY MATTER, THE INDUSTRY REGRETS THAT IT WAS UNABLE TO OBTAIN A FINAL COPY OF THE INSPECTOR GENERAL'S REPORT SUFFICIENTLY IN ADVANCE OF TODAY'S HEARING. WE TRUST THAT THE SUBCOMMITTEE WILL ALLOW US THE OPPORTUNITY TO SUBMIT A FURTHER STATEMENT FOR THE RECORD IN RESPONSE TO THE REPORT.

THIS IS AN IMPORTANT AND SERIOUS MATTER. I AM THEREFORE, HONORED AND PLEASED THAT YOU HAVE INVITED ME TO SHARE WITH YOU MY EXPERIENCE, OBSERVATIONS, AND VIEWS.

A SUMMARY OF MY BACKGROUND MAY BE HELPFUL TO THE SUBCOMMITTEE. I GRADUATED FROM THE U.S. MERCHANT MARINE ACADEMY AT KINGS POINT AND HOLD A MASTERS DEGREE IN NUCLEAR ENGINEERING FROM THE MASSACHUSETTS INSTITUTE OF TECHNOLOGY. FOLLOWING A PERIOD OF ACTIVE DUTY WITH THE NAVY, I BEGAN MY CAREER AT THE BETHLEHEM STEEL CO. SHIPYARD AT QUINCY, MASSACHUSETTS DESIGNING AND CONSTRUCTING NUCLEAR POWERED WARSHIPS FOR THE U.S. NAVY.

SUBSEQUENTLY I HAVE DEVOTED MY ENTIRE PROFESSIONAL LIFE SINCE 1971 TO THE COMMERCIAL NUCLEAR INDUSTRY, FIRST WITH ONE OF THE NATION'S LEADING ARCHITECT ENGINEER COMPANIES WHERE I WAS INVOLVED IN THE DESIGN, ENGINEERING AND CONSTRUCTION OF MORE THAN A DOZEN NUCLEAR POWER PLANTS AND, FOR THE PAST THIRTEEN YEARS, AS HEAD OF THE NUCLEAR PROGRAMS AT NUCLEAR UTILITIES, INCLUDING THE PAST FOUR YEARS WITH FLORIDA POWER & LIGHT COMPANY.

IN APPROACHING THE SUBJECT OF THESE HEARINGS, I START FROM ONE ESSENTIAL PREMISE: EMPLOYEES IN THE NUCLEAR INDUSTRY WHO IDENTIFY AND REPORT SAFETY CONCERNS PERFORM AN INVALUABLE PUBLIC SERVICE. IN THE NUCLEAR INDUSTRY, OUR DESIGN PHILOSOPHY IS REFERRED TO AS "DEFENSE IN DEPTH." THIS MEANS THAT WE PROVIDE MULTIPLE SAFETY BARRIERS AND REDUNDANT BACKUP SYSTEMS TO INSURE PROTECTION OF THE PUBLIC HEALTH AND SAFETY. IN USING THAT TERM, WE TEND TO FOCUS ON HARDWARE AND ENGINEERING FEATURES. BUT OF EQUAL OR GREATER IMPORTANCE TO THE CONCEPT OF "DEFENSE IN DEPTH", ARE THE TENS OF THOUSANDS OF HIGHLY TRAINED AND MOTIVATED PEOPLE INVOLVED IN THE OPERATION AND SUPPORT OF NUCLEAR POWER PLANTS AND RELATED FACILITIES. THEIR DEDICATION AND SKILL IS AT THE HEART OF THE ELABORATE MEASURES WHICH ASSURE THE SAFETY OF OPERATIONS AT EVERY NUCLEAR PLANT.

WE COUNT ON THESE PEOPLE TO DO MORE THAN THEIR ASSIGNED JOBS WITH COMPLETE DEDICATION AND DISCIPLINE. WE ASK THAT THEY ALSO SERVE AS AN EXTRA SET OF "EYES AND EARS" FOR MANAGEMENT TO IDENTIFY SAFETY CONCERNS; TO ALERT US WHEN TASKS ARE NOT BEING PERFORMED IN THE MANNER REQUIRED BY THE DETAILED PROCEDURES WHICH GOVERN ALMOST EVERY ACTIVITY AT A NUCLEAR PLANT; AND TO ADVISE OF ANY OTHER PROBLEMS WHICH, BECAUSE OF THEIR TRAINING AND EXPERIENCE AND THEIR CLOSENESS TO THE OPERATIONS, THEY ARE UNIQUELY POSITIONED TO RECOGNIZE. MY EXPERIENCE IS THAT THEY DO AN OUTSTANDING JOB IN BRINGING THEIR INSIGHTS AND CONCERNS TO MANAGEMENT IN A THOROUGHLY PROFESSIONAL WAY.

IT IS ALSO MY EXPERIENCE THAT, WITH VERY FEW EXCEPTIONS, THE INDUSTRY'S EMPLOYEES FEEL FREE TO RAISE SAFETY CONCERNS DIRECTLY WITH MANAGEMENT. THE MORE THAN 100,000 EMPLOYEES IN THE INDUSTRY DISCUSS WITH THEIR MANAGEMENT ON A DAILY BASIS NUMEROUS ISSUES, INCLUDING VARIOUS SAFETY CONCERNS, WHICH ARE THOROUGHLY REVIEWED AND RESOLVED. THIS IS NOT SURPRISING. THESE EMPLOYEES, AS I HAVE SAID, ARE TRUE PROFESSIONALS AND THEY WORK IN AN INDUSTRY WHICH HAS AN OVERWHELMING STAKE IN ASSURING THE FREE FLOW OF INFORMATION THAT MAY AFFECT SAFE AND RELIABLE OPERATION. THE INDUSTRY ENCOURAGES

OPEN COMMUNICATION NOT ONLY BECAUSE IT CONTRIBUTES TO SAFE OPERATION, BUT ALSO BECAUSE IT MAKES GOOD BUSINESS SENSE. OUR ENLIGHTENED SELF-INTEREST MAKES IT IMPERATIVE TO PROTECT THE ENORMOUS INVESTMENT INVOLVED IN EVERY NUCLEAR PLANT.

I, THEREFORE, FEEL SOME REGRET THAT WE HAVE COME TO REFER TO THESE EMPLOYEE-CONTRIBUTORS AS "WHISTLEBLOWERS." THE TERM IMPLIES THAT PEOPLE WHO RAISE SAFETY CONCERNS ARE DOING SOMETHING UNUSUAL AND PERHAPS PLACING THEIR PERSONAL WELL-BEING AT RISK WHEN, IN FACT, THEIR CONTRIBUTION IS WELCOMED, ENCOURAGED AND EXPECTED.

AT EVERY SITE WITH WHICH I AM FAMILIAR, THE CHAIN OF COMMAND -- FROM FIRST-LINE SUPERVISION THROUGH SENIOR MANAGEMENT -- HAS A SAFETY ETHIC WHICH LEADS TO AN ATMOSPHERE IN WHICH CONSCIENTIOUS EMPLOYEES KNOW THAT THEIR CONCERNS WILL BE TREATED SERIOUSLY AND THAT THEY MAY BE EXPRESSED WITHOUT FEAR OF RETRIBUTION OR OTHER ADVERSE CONSEQUENCES. IN ADDITION, ALMOST ALL PLANTS HAVE FORMAL PROGRAMS WHICH AFFORD EMPLOYEES THE OPPORTUNITY TO RAISE ISSUES OUTSIDE THE CHAIN OF COMMAND DUE TO REAL OR PERCEIVED PROBLEMS WITH LINE MANAGEMENT.

I BRING THIS INFORMATION TO YOU SO THAT YOU WILL UNDERSTAND THE NORM IN THE INDUSTRY AS YOU CONSIDER, AND HEAR TESTIMONY ABOUT SITUATIONS WHICH ARE TRULY DEPARTURES FROM THE NORM. A RELATIVELY SMALL NUMBER OF EMPLOYEES -- ABOUT 120 EACH YEAR FROM THE TOTAL NATIONAL WORK FORCE -- FILE COMPLAINTS UNDER SECTION 211 (FORMERLY 210) OF THE ENERGY REORGANIZATION ACT. ONLY A SMALL PERCENTAGE OF THESE FEW CASES INVOLVE INSTANCES OF ABUSE AT EXTREME ENDS OF THE SPECTRUM; THAT IS, EITHER ISOLATED EXAMPLES OF REAL RETRIBUTION, GENERALLY BY LOWER LEVEL MANAGERS AGAINST EMPLOYEES WHO HAVE RAISED CONCERNS OR, AT THE OTHER EXTREME, EMPLOYEES WHO HAVE TRIED TO "GAME THE SYSTEM" TO REALIZE ECONOMIC ADVANTAGE. I HAVE SEEN EXAMPLES OF BOTH WITH ABOUT EQUAL FREQUENCY.

OF COURSE, WE MUST ALL BE CONCERNED ABOUT EVEN ONE EMPLOYEE WITH A SIGNIFICANT SAFETY ISSUE WHO FAILS TO RAISE A CONCERN FOR FEAR OF LOSS OF JOB OR OTHER THREATS TO THEIR CAREERS. BUT IN THE CONTEXT OF CONSIDERING NEW LEGISLATION OR OTHER REMEDIAL ACTION, PERSPECTIVE IS ONCE AGAIN CRUCIAL. MY PERSONAL EXPERIENCE IS THAT THE OVERWHELMING PREPONDERANCE OF SIGNIFICANT SAFETY CONCERNS COME TO LIGHT THROUGH ONE OF THE MANY NORMAL MECHANISMS WIDELY USED IN THE INDUSTRY. WITH FEW EXCEPTIONS, THE SAFETY CONCERNS ASSOCIATED WITH SECTION 211 COMPLAINTS HAVE BEEN ADDRESSED PRIOR TO INITIATION OF THE COMPLAINT, AND HAVE BEEN FOUND TO BE OFTEN TIMES

OF MARGINAL, OR NO, SAFETY SIGNIFICANCE. LET ME ADD QUICKLY, THAT THIS DOES MEAN THAT PROBLEMS IN THE PRESENT SYSTEM, IF THEY EXIST, SHOULD NOT BE ADDRESSED, BUT RATHER THAT IMPROVEMENTS SHOULD BE TARGETED TO MEET REAL PROBLEMS AND THE ADVERSE EFFECTS OF ANY PROGRAMMATIC CHANGES BE CAREFULLY CONSIDERED.

IT HAS BEEN ARGUED THAT THE PRESENT SYSTEM IS LONG AND ARDUOUS AND, THEREFORE, DISCOURAGING TO 211 COMPLAINANTS. LET ME ADDRESS THE DEPARTMENT OF LABOR (DOL) PROCESS FIRST. UNDER THE PRESENT ARRANGEMENTS, THE AREA DIRECTOR OF THE WAGE AND HOUR DIVISION OF THE DOL INITIATES AND COMPLETES AN INITIAL INVESTIGATION OF THE COMPLAINTS VERY QUICKLY -- USUALLY LESS THAN 60 DAYS FROM THE TIME THE COMPLAINT IS FILED. THE DOL MAY ALSO PERFORM THE VERY USEFUL FUNCTION OF MEDIATING A RESOLUTION IN APPROPRIATE CASES. IF THE MATTER IS NOT RESOLVED AT THIS STAGE, THE LOSING PARTY HAS THE RIGHT OF APPEAL AND MAY REQUEST A HEARING BEFORE A DOL ADMINISTRATIVE LAW JUDGE (ALJ). THE OBJECTIVE DATA SHOWS THAT THIS PROCESS IS RELATIVELY QUICK. THERE ARE A FEW EXCEPTIONS BUT THE ALJs WASTE LITTLE TIME AND THE AVERAGE PERIOD FROM NOTICE OF THE APPEAL TO ISSUANCE OF A RECOMMENDED DECISION IS LESS THAN 18 MONTHS. THE ONLY POTENTIALLY FRUSTRATING DELAY IS IN OBTAINING A FINAL DECISION BY THE SECRETARY OF LABOR. I CANNOT EXPLAIN THE REASON FOR THAT, BUT I DOUBT THAT LEGISLATION IS NECESSARY IF THE PROBLEM IS ONE OF ADMINISTRATIVE EFFICIENCY. MOREOVER, IT IS MY UNDERSTANDING THAT THIS PROBLEM IS ADDRESSED, IN PART, BY LAST YEAR'S AMENDMENTS TO SECTION 211, UNDER WHICH A WRONGFULLY TERMINATED EMPLOYEE MAY BE REINSTATED PENDING APPEAL FOLLOWING A FAVORABLE ALJ DECISION. THE EMPLOYEE IS, THEREFORE, MUCH MORE LIKELY TO OBTAIN SPEEDY AND MORE COMPLETE RELIEF (I.E., REINSTATEMENT) FROM THE DOL THAN IN A STATE COURT OR ANY OTHER LEGAL FORUM.

THE PROCESS ALSO WORKS REASONABLY WELL ON THE NRC SIDE. IT IS MY GENERAL VIEW THAT THE BASIC DIVISION OF RESPONSIBILITIES BETWEEN THE NRC AND DOL IS LOGICAL AND PROMOTES, RATHER THAN DETRACTS FROM, ADMINISTRATIVE EFFICIENCY. THE PRIMARY GOAL OF THE NRC IS PROTECTING PUBLIC HEALTH AND SAFETY. WHEN IT RECEIVES A SAFETY RELATED EMPLOYEE COMPLAINT, THE COMMISSION DEALS WITH IT PROMPTLY, EITHER PRIOR TO, OR IN PARALLEL WITH, DOL'S INITIAL INVESTIGATION INTO THE UNDERLYING PERSONNEL COMPLAINT. WE BELIEVE THAT IT WOULD BE UNWISE TO REQUIRE THE NRC TO FURTHER STRETCH ITS LIMITED RESOURCES TO GO BEYOND ITS SAFETY JURISDICTION AND GET INVOLVED IN EMPLOYER-EMPLOYEE RELATIONS MATTERS WHICH ARE NOT WITHIN ITS AREA OF EXPERTISE.

WITH RESPECT TO THE RELATIONSHIP BETWEEN LICENSEE MANAGEMENT AND ITS EMPLOYEES, THE COMMISSION HAS HISTORICALLY -- AND WISELY STAYED ITS HAND. THIS ALLOWS THE DOL AN OPPORTUNITY TO INVESTIGATE THE COMPLAINT, AND MORE IMPORTANTLY TO MEDIATE A RESOLUTION. HOWEVER, NRC WILL USUALLY SEND A "CHILLING EFFECT" LETTER TO A LICENSEE IF THE DOL AREA DIRECTOR FINDS IN FAVOR OF THE EMPLOYEE, AND EVEN IF THE PARTIES SETTLE THEIR DIFFERENCES. THE LETTER REQUIRES THE LICENSEE TO EXPLAIN THE CIRCUMSTANCES OF THE CASE AND SPECIFY THE STEPS BEING TAKEN TO ASSURE THAT OTHER EMPLOYEES ARE NOT DISCOURAGED FROM RAISING SAFETY CONCERNS. THE LETTERS ARE TAKEN VERY SERIOUSLY BY LICENSEES, IN PART BECAUSE OF THE POTENTIAL FOR SERIOUS REGULATORY CONSEQUENCES. THIS IS INDEPENDENT OF THE NRC'S CONSIDERATION OF THE UNDERLYING SAFETY CONCERN WHICH IS TRACKED AND RESOLVED UNDER THE COMMISSION'S ALLEGATION MANAGEMENT SYSTEM.

IF THE ALJ'S DECISION IS ADVERSE TO THE EMPLOYER, NRC MAY ISSUE A NOTICE OF VIOLATION AND CIVIL PENALTY. IT HAS BEEN ARGUED THAT THE PENALTIES ARE NOT SUFFICIENTLY SEVERE, PARTICULARLY WITH RESPECT TO OFFENDING MANAGERS. ALTHOUGH NO BUSINESS IS INSENSITIVE TO THE FINANCIAL CONSEQUENCES OF ITS ACTIONS, I CAN TELL YOU THAT, BECAUSE OF THE NUCLEAR INDUSTRY'S UNIQUE PUBLIC VISIBILITY, PENALTIES ASSESSED FOR VIOLATIONS OF THIS TYPE, REGARDLESS OF THE AMOUNT, ARE TREATED WITH VERY SERIOUS CONCERN. I DOUBT THAT MORE SEVERE PENALTIES WOULD HAVE ANY MATERIAL EFFECT ON THE STEPS WHICH LICENSEES CURRENTLY TAKE TO PROMOTE FREE COMMUNICATION OF SAFETY CONCERNS AS WELL AS PROTECT THEIR REPUTATIONS AGAINST CLAIMS OF INTIMIDATION AND HARASSMENT.

COMPANIES ALSO TAKE ACTION AGAINST OFFENDING MANAGERS AND THESE ACTIONS ARE REVIEWED BY NRC: ABSENT AN EGREGIOUS SITUATION THAT CLEARLY JUSTIFIES NRC SANCTIONS AGAINST AN INDIVIDUAL MANAGER UNDER THE WRONGDOER RULE, HOWEVER, FURTHER FEDERAL ACTION IS NOT WARRANTED. MOREOVER, THE POWER TO INVOKE SUCH SANCTIONS MUST BE EXERCISED WITH GREAT CARE AND DISCRETION FOR IT MAY HAVE THE EFFECT OF DESTROYING AN OTHERWISE DISTINGUISHED CAREER ON THE BASIS OF A SINGLE INCIDENT.

IT HAS BEEN SUGGESTED THAT THE NRC SHOULD NOT "STAY ITS HAND" PENDING OPERATION OF THE DOL PROCESS; SPECIFICALLY, THAT IT SHOULD INTERPOSE ITS INVESTIGATIVE AND ENFORCEMENT FUNCTIONS AT AN EARLIER STAGE. I WOULD LIKE TO ADDRESS THAT SUGGESTION FROM TWO PERSPECTIVES: THE IMMEDIATE MATTER OF ASSURING THE PUBLIC HEALTH AND SAFETY; AND THE ADVERSE CONSEQUENCES AND COSTS OF INJECTING NRC

INTO THE PICTURE AT AN EARLIER POINT IN THE PROCESS.

FIRST, IT SHOULD BE UNDERSTOOD THAT WHERE THE 211 COMPLAINANT HAS IDENTIFIED AN APPARENT SAFETY CONCERN, THE NRC IMMEDIATELY AND AGGRESSIVELY RESPONDS. ALTHOUGH NO AGENCY IS IMMUNE FROM CRITICISM THAT IN ONE CASE OR ANOTHER IT MIGHT HAVE ACTED MORE QUICKLY, I BELIEVE THE NRC'S RECORD OVER THE YEARS HAS BEEN GOOD. IN ANY EVENT, ONE THING IS CLEAR -- ALTHOUGH NRC MAY AWAIT THE OUTCOME OF THE DOL PROCESS BEFORE TAKING ACTION WITH RESPECT TO ALLEGATIONS OF INTIMIDATION AND HARASSMENT, THE PENDENCY OF A DOL PROCEEDING HAS NO BEARING ON THE TIMELY RESOLUTION OF ANY UNDERLYING SAFETY ISSUE.

IF NO SUBSTANTIVE SAFETY PURPOSE IS SERVED BY EARLIER NRC INTERVENTION IN SECTION 211 CASES, IS THERE SOME OTHER REASON TO JUSTIFY A CHANGE IN EXISTING PRACTICE? WITH PERHAPS ONE EXCEPTION, THAT BEING IF THERE IS EVIDENCE OF PERVASIVE INTIMIDATION OF A NUMBER OF EMPLOYEES RAISING CONCERNS, THE ANSWER IS "NO" AND THE REASONS ARE STRAIGHTFORWARD:

- FIRST, EARLIER, AGGRESSIVE NRC INTERVENTION WOULD REQUIRE SUBSTANTIAL ADDITIONAL NRC RESOURCES -- PARTICULARLY IN INVESTIGATIVE FUNCTIONS. A DIVERSION OF THESE RESOURCES AWAY FROM WELL FOCUSED SAFETY-RELATED INVESTIGATIONS TOWARD AN AGENDA DRIVEN BY THE CONCERNS OF 211 COMPLAINANTS, WHICH MAY OR MAY NOT INVOLVE REAL SAFETY SIGNIFICANCE, IS NOT IN THE PUBLIC INTEREST.

- SECOND, SUCH EARLY NRC INVESTIGATIONS MAY FURTHER POLARIZE EMPLOYMENT RELATIONSHIPS AND THEREBY INTERFERE WITH THE DOL'S MEDIATION AND CONCILIATION EFFORTS WHICH, AT TIMES, ARE SUCCESSFUL. THIS IS IN ADDITION TO THE WASTE INVOLVED IN DUPLICATIVE AND OVERLAPPING NRC AND DOL INVESTIGATIONS

- THIRD, HASTY NRC INTERVENTION CARRIES WITH IT THE RISK OF DISTRACTING BOTH NRC AND LICENSEE MANAGEMENT ATTENTION FROM MORE SIGNIFICANT SAFETY ISSUES TOWARD AN AGENDA DRIVEN BY THE INVESTIGATIVE PROCESS. IT IS MY OBSERVATION THAT ANY MATTER UNDER INVESTIGATION, REGARDLESS OF ITS REAL SAFETY SIGNIFICANCE, RISES TO THE TOP OF MANAGEMENT'S AGENDA SIMPLY BECAUSE IT IS PERCEIVED AS BEING IMPORTANT TO THE COMMISSION.

- FINALLY, EARLIER AND MORE AGGRESSIVE ENFORCEMENT ACTION BY THE NRC MAY PREJUDICE THE OUTCOME OF THE DOL CASE AND "CHILL" THE MANAGEMENT DECISION-MAKING PROCESS. IF DISCIPLINE AND

ATTENTION TO DETAIL ARE THE HALLMARKS OF A WELL RUN PLANT -- AND I WILL ATTEST TO THAT -- THEN MANAGEMENT MUST BE ABLE TO TAKE LEGITIMATE PERSONNEL ACTIONS THAT ARE IN THE INTERESTS OF SAFETY AND RELIABILITY. IF THEY DELAY OR FAIL TO DO SO BECAUSE THEY FEAR THE OUTCOME OF RELATED LEGAL PROCEEDINGS OR THE CONSEQUENCES OF A LOWERED THRESHOLD OF MORE SEVERE NRC ENFORCEMENT ACTION, THIS RUNS COUNTER TO THE PUBLIC INTEREST IN SAFETY.

* * * * *

IN SUMMARY, THE INDUSTRY BELIEVES THAT THE PRESENT PROCESS WORKS SATISFACTORILY; NO CHANGES ARE WARRANTED TO ASSURE IDENTIFICATION OF SAFETY ISSUES; THE INTERESTS OF SECTION 211 COMPLAINANTS ARE PROTECTED; AND, MOST IMPORTANTLY, THE SYSTEM ACHIEVES A BALANCE WHICH SERVES THE PUBLIC INTEREST IN SAFE NUCLEAR OPERATIONS. IT IS A DELICATE BALANCE WHICH SHOULD NOT BE UPSET IN THE ABSENCE OF A COMPELLING REASON AND WE SEE NONE.

I APPRECIATE THE OPPORTUNITY TO SHARE THESE THOUGHTS WITH YOU AND I WOULD BE HAPPY TO ANSWER ANY QUESTIONS.

MAX BAUCUS, MONTANA, CHAIRMAN
DANIEL PATRICK MOYNIHAN, NEW YORK
GEORGE J. MITCHELL, MAINE
FRANK R. LAUTENBERG, NEW JERSEY
HARRY REID, NEVADA
BOB GRAHAM, FLORIDA
JOSEPH I. LIEBERMAN, CONNECTICUT
HOWARD M. METZENBAUM, OHIO
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BARBARA BOXER, CALIFORNIA
JOHN H. CHAFEE, RHODE ISLAND
ALAN K. SIMPSON, WYOMING
DAVE DURENBERGER, MINNESOTA
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ROBERT SMITH, NEW HAMPSHIRE
LAUCH FAIRCLOTH, NORTH CAROLINA
DIRK KEMPTHORNE, IDAHO
PETER L. SCHER, STAFF DIRECTOR
STEVEN J. SHIMBERG, MINORITY STAFF DIRECTOR AND CHIEF COUNSEL

United States Senate
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
WASHINGTON, DC 20510-6175

August 3, 1993

The Honorable Robert B. Reich
Secretary
U.S. Department of Labor
Washington, DC 20210

Dear Secretary Reich:

We are writing to request your assistance in the oversight activities that are being conducted by the Subcommittee on Clean Air and Nuclear Regulation regarding the federal government's handling of allegations of intimidation, harassment, and discrimination that are raised by employees in the nuclear industry.

On July 15, 1993, the Subcommittee conducted a hearing on the Nuclear Regulatory Commission's (NRC) handling of these allegations. The Subcommittee heard testimony from the NRC, the Office of Inspector General of the NRC, the nuclear industry, and from two former employees of the nuclear industry.

At this hearing a number of issues were raised concerning the role and response of the NRC in investigating allegations of unlawful discrimination and the role and response of the Department of Labor (DOL) role in adjudicating complaints of unlawful intimidation, harassment, or discrimination filed under sections 210 and 211 of the Energy Reorganization Act of 1974. Specifically, a number of witnesses raised concerns regarding the timeliness of the actions of both NRC and DOL in their respective roles in resolving allegations of unlawful discrimination that are raised by nuclear whistleblowers. The timeliness of the DOL's process also is discussed in the recent report by the DOL's Inspector General, "Audit of the Office of Administrative Appeals," Report No. 17-93-009-01-010, date May 19, 1993.

To assist the Subcommittee in its evaluation of the issues raised at this hearing and during our oversight activities, we would appreciate it if the DOL would provide answers to the questions that are attached. These questions and answers will become part of the hearing record, which will form the basis for any further actions by the Subcommittee on this subject.

If you have any questions, please do not hesitate to contact Mr. Dan Berkovitz (224-4039) or Mr. John Zirschky (224-2991) of the Subcommittee staff. Thank you very much for your consideration and attention.

Sincerely,

Alan K. Simpson
Ranking Minority Member
Subcommittee on Clean Air
and Nuclear Regulation

Joseph I. Lieberman
Chairman
Subcommittee on Clean Air
and Nuclear Regulation

QUESTIONS FOR THE DEPARTMENT OF LABOR

HANDLING OF COMPLAINTS OF UNLAWFUL DISCRIMINATION
UNDER
SECTIONS 210 AND 211 OF THE ENERGY REORGANIZATION ACT OF 1974

1. (a) For each of the past ten years, how many cases brought under sections 211 (formerly section 210) of the Energy Reorganization Act of 1974 have been appealed to the Office of Administrative Appeals (OAA)? (b) How long did it take the OAA to resolve each of these cases?

2. (a) For each of the settlement agreements presented to the OAA for approval over the past ten years, how long did it take the OAA to review these agreements? (b) How long has each of the settlement agreements pending before the OAA been pending?

3. For the past ten years, how many complaints have been found to be meritorious by the Secretary, and how long has it taken, from the date of the filing of the complaint to the date of the Secretary's decision, for a final decision in favor of the complainant in each of those cases?

4. For the past ten years, how many complaints have been found to be non-meritorious by the Secretary, and how long has it taken, from the date of the filing of the complaint to the date of the Secretary's decision, for a final decision in favor of the employer in each of those cases?

5. When a decision by an ALJ finds that a complaint has merit, does the Secretary issue a preliminary order granting immediate relief, as required in the Energy Policy Act of 1992?

6. The report by the DOL's Inspector General stated that 10 of the oldest 26 pending cases were whistleblower cases. How many of these were nuclear whistleblower cases? Are any of these cases still pending?

7. What actions does the DOL intend to take to remedy the problems identified by the IG in the Office of Administrative Appeals?

8. Would it be beneficial or would it be detrimental if the NRC were to begin more of its investigations at an earlier stage in the DOL process? Would the results of a NRC investigation be prejudicial or helpful to the DOL during the DOL process?

9. How long does it take on average for the Secretary to issue a final decision in cases which are not settled?

10. How many cases now before the Secretary have been awaiting final decision for more than one year?

11. What are the causes for the substantial delay between issuance of a recommended decision and issuance of a final decision?

12. Does the Office of Administrative Appeals have adequate resources to review cases and draft final decisions for the Secretary?

13. In view of the delays inherent in the Secretary's review of ALJ recommended decisions, are there any administrative changes that could be made which would improve the review process?

14. Do whistleblower cases related to nuclear power facilities take longer to resolve than other whistleblower cases? If so, why? If not, what other types of cases take longer to resolve, and why?

15. Please list all of the various whistleblower statutes and the resources required to address the whistleblower cases handled pursuant to each statute.

16. Please provide a schematic diagram that describes the process by which the department of labor reviews whistleblower complaints under sections 210 and 211 of the Energy Reorganization Act. On this diagram, please show the percentage of cases which reach each step in the process with a breakdown (by percentage) explaining how cases are resolved at each step (e.g., at step 1, 25% of cases are resolved, with 16% of the cases settled and 5% of the cases dropped, etc.).

17. Please provide any data you have on the costs a whistleblower can expect to incur to proceed through each step of the process.

18. What problems does the DOL envision would arise if nuclear facilities were required to reinstate individuals in cases that the DOL believes unlawful discrimination may have occurred, but for which the ALJ has not made a determination?

19. Does DOL have any criteria by which they determine whether or not an employer has a pattern of unlawful discrimination against whistleblowers? If so, what is this definition and what sanctions are placed against employers who exhibit such a pattern?

U.S. DEPARTMENT OF LABOR

DEPUTY SECRETARY OF LABOR
WASHINGTON, D.C.
20210

SEP 9 1993

The Honorable Joseph I. Lieberman
Chairman
Subcommittee on Clean Air
and Nuclear Regulation
United States Senate
Washington, DC 20510-6175

Dear Chairman Lieberman:

This responds to your letter of August 3, 1993, requesting information on the Department of Labor's role and response in the adjudication of nuclear whistleblower complaints under the Energy Reorganization Act of 1974.

The letter and questions submitted to the Department of Labor were forwarded to the Office of Administrative Appeals (OAA) for coordination of the response. OAA assists the Secretary in the adjudication of whistleblower complaints arising under the employee protection provision of the ERA and several other environmental statutes, by reviewing the recommended decisions issued by the Office of Administrative Law Judges in these cases.

Because OAA has responsibility only for the final phase of the Department's handling of an ERA whistleblower complaint, they do not maintain all of the records and information requested by your committee. Accordingly, OAA must coordinate with other Department of Labor agencies, such as the Wage and Hour Division of the Employment Standards Administration, and the Office of the Solicitor of Labor in order to fully respond to your inquiry. Moreover, OAA cannot readily produce the numerical data sought for all of the Secretary's ERA decisions over the last ten years. The record-keeping format used in OAA does not distinguish ERA cases from other environmental whistleblower cases, and does not include all of the requested information, such as the amount of elapsed time from date of complaint until issuance of a final decision by the Secretary. Much of this data for the ten year period in question will be compiled for the first time in response to this inquiry, by individually searching each case file and retrieving the data sought from various documents contained therein. There are about 1000 such whistleblower case files which must be reviewed to ensure that the information provided is complete and accurate. OAA has begun reviewing the whistleblower case files and compiling the necessary data and time computations needed to provide complete responses to your inquiry.

Please be assured that this matter is receiving our prompt and thorough attention, and we intend to fully comply with your request as quickly as possible.*

Sincerely,

Thomas P. Glynn

cc: The Honorable Alan K. Simpson
Ranking Minority Member

*As of the date of publication of this hearing (May 6, 1994) no further communication from the Department of Labor has been received.

TESTIMONY OF ROBERT J. HORN

SUBCOMMITTEE ON CLEAN AIR AND NUCLEAR REGULATION

August 4, 1993

My name is Robert J. Horn and I am assistant vice president and manager, Federal Affairs of The Detroit Edison Company (Detroit Edison). Detroit Edison is the largest investor-owned electric utility in the State of Michigan, serving some 1.9 million customers in a 7,600-square-mile service territory. Detroit Edison owns and operates one nuclear generating unit -- Fermi 2 -- which began commercial operation in January 1988 and has a licensed capability of 1,139 megawatts.

I appreciate the opportunity to submit Detroit Edison's comments for the record with regard to the hearing on nuclear whistleblowers held on July 15, 1993, before the Senate Committee Environment and Public Works, Subcommittee on Clean Air and Nuclear Regulation. The hearing coincided with the release of the report by the Nuclear Regulatory Commission's (NRC) Inspector General on the treatment of whistleblowers in the nuclear industry, particularly alleged violations of the statutes to protect whistleblowers.

It is the position of the nuclear industry and Detroit Edison that employees who identify and report safety-related concerns perform an invaluable public service. The nuclear industry encourages its employees to communicate openly and freely with their companies, especially when the protection of public health and safety is at stake. The fear of retribution, however, can prevent employees at nuclear power plants from raising their concerns about the safe operation of a plant -- a scenario which serves no side well, neither the public nor the utility and certainly not the employee. Jerome H. Goldberg, president, Nuclear Division, Florida Power and Light Company, stated during his testimony that "almost all plants have formal programs which afford employees the opportunity to raise issues outside the chain of command due to real or perceived problems with line management."

In recognition of the importance of this critical issue, I would like to identify and describe for the Committee an example of the kind of program Mr. Goldberg was referring to, in which industry is ensuring that employees' concerns are being addressed. Detroit Edison developed the "SAFETEAM" program originally during the construction of its own Fermi 2 nuclear power plant back in 1983. Since then, four other nuclear power plants have successfully used the SAFETEAM approach to handle the safety concerns of their employees. Many other plants have used SAFETEAM as a model for internally developed programs.

SAFETEAM's foundation is the use of an independent, third party to mediate between the workers and management. This unique approach has proven very effective because it ensures the anonymity of the employee. We believe this level of protection is essential in order to maintain the integrity of any whistleblower program.

The SAFETEAM program is made available to all levels of employees at a nuclear power plant, temporary as well as permanent, and all are given the opportunity to participate. Interviews with concerned employees are conducted by trained interviewers who focus on getting the details. The validity of the resulting written concern is checked by an investigative staff before any corrective action is contemplated. All process records are nameless to help protect the anonymity of the employee.

Another benefit of the SAFETEAM program is that safety concerns which employees raise are handled in a timely, efficient manner -- typically within six weeks -- thus avoiding a protracted investigation by a government agency which may take a year or more. Also, because the employee is guaranteed anonymity, issues such as whether retaliatory action was taken by a utility against a whistleblower are completely dispensed with, leaving full attention and effort to be directed at the real issues: public health and safety.

We support the position of the rest of the nuclear utility industry that changes to assure the identification of safety issues are not warranted, but believe the addition of a third-party program enhances the reporting of concerns.

SAFETEAM is a product of Utility Technical Services, a subsidiary of The Detroit Edison Company. The ATTACHED information describes the SAFETEAM program in detail.

SAFETEAM is a unique program that will help prevent unwanted exposure to public issues arising from business operations through the early identification and thorough investigation of worker concerns. It also provides workers at all levels with a channel to express their concerns in a way that (1) ensures their anonymity to the extent that they desire, (2) brings significant valid concerns to the attention of company management, and (3) provides the concerned employee with a constructive alternative to expressing his or her concerns to outside organizations or the news media.

The SAFETEAM program has proven effective at several nuclear power plant sites where construction and operating standards are very high and the consequences of public surfacing of concerns are extremely great. The uniqueness of the program rests on having an independent organization provide a managed opportunity for workers to express concerns that may not be recognized, or effectively responded to, through normal channels. The public and organizations benefits of the program can be sizeable and significant.

The program begins with an invitation to employees to visit an on-site SAFETEAM center. Although scheduled visits for key personnel are recommended, this invitation is normally made on a "walk-in" basis. Once there, employees receive a SAFETEAM memento as an expression of the client company's appreciation, are offered simple refreshments and then view a specially developed videotape presentation in which senior client company management personally thanks them for their contributions as employees and encourages them to share any concerns they may have.

Following this presentation, they are given an opportunity to share these concerns in a confidential interview. If no concerns are expressed, the employee is given a postage-paid "mail-in" form for use if concerns are identified or remembered at a later time. A toll-free telephone number is offered for the same purpose.

If an interview is requested, the employee enters a private room and is asked a series of carefully structured questions by a trained interviewer. Interviews are tape recorded only if the employee agrees. An interview concern report form is completed by the interviewer and retained for further use. All records of concerns from this point forward are "nameless" to help protect the anonymity of the employee. A specially developed computerized concern tracking system is used to help maintain confidentiality and provide effective administration.

The resulting concerns expressed during the interviews are then classified by a management representative into pre-selected categories for follow-up investigation. The categories would normally include public interest, public safety, quality control, industrial safety, security and site efficiency, but may be expanded or contracted as necessary to reflect specific requirements. Concerns that deal strictly with interpersonal

relationships between employees or between employee and supervisor are returned to normal channels for investigation and disposition.

If the concern is public interest-related or in another category considered worthy of SAFETEAM follow-up, a SAFETEAM investigation is conducted by a specially trained team. (The resolution of other concern classifications is normally investigated by client company organizations charged with that particular functional responsibility; however, the SAFETEAM process ensures that this internal investigation is completed.)

Following the satisfactory completion of an investigation, a report is prepared by the SAFETEAM staff and subsequently reviewed by a management review board. This board normally consists of a client manager and representatives of the legal and public relations staffs. However, other functions may be added, if desired.

Once this board has been satisfied that the investigation is complete and any required corrective actions are underway, a concern response letter is prepared stating what was found and what corrective action, if any, was taken. The body of this letter will be reviewed by the same board that reviewed the investigation report before it is sent to ensure that the report content has not been changed. Included in this response letter to the employee is the toll-free telephone number and an invitation to comment, if he or she is not satisfied with the response, as well as to submit future concerns.

If a site is currently under construction or has taken on a large temporary workforce, the SAFETEAM program is modified slightly to ensure that all site workers have had an opportunity to participate. In addition to regularly scheduled visits and "walk-ins," each worker is invited to the SAFETEAM Center for an interview on his or her last day of site employment. The remainder of the program steps are the same.

SAFETEAM can and should be modified to successfully interface with existing communication programs at the client site. However, the key principles of a voluntary, confidential interview conducted by an outside party are essential.

The SAFETEAM program provides a proven means of improving the early identification of potential public interest, public safety, quality control and other problem areas, thereby permitting corrective action to be taken before more drastic measures may be required or imposed, before the cost of corrective action increases or before public embarrassment or loss of public trust becomes a factor. The program has been likened to a giant safety net surrounding the site of deployment but not replacing or interfering with established control systems ... and it works.

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